(2) No. 03- 031552 MAY 14 2004

IN THE

Supreme Court of the United States

AMERICAN TELESERVICES ASSOCIATION, MAINSTREAM MARKETING SERVICES, INC., AND TMG MARKETING, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (Continued) VOLUME II

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[SEAL] FEDERAL TRADE COMMISSION
RULES and REGULATIONS

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16 CFR Part 310 Telemarketing Sales Rule

Wednesday, January 29, 2003

AGENCY: Federal Trade Commission.

ACTION: Final Amended Rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Statement of Basis and Purpose ("SBP") and final amended Telemarketing Sales Rule ("amended Rule"). The amended Rule sets forth the FTC's amendments to the Telemarketing Sales Rule ("original Rule" or "TSR"). The amended Rule is issued pursuant to the Commission's Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act").

EFFECTIVE DATES: The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

ADDRESSES: Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at http:// www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452, Karen Leonard, (202) 326-3597, Michael Goodman, (202) 326-3071, or Carole Danielson, (202) 326-3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule: (1) retains most of the original Rule's requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national "do-not-call" registry maintained by the Commission; (3) defines "upselling" to clarify the amended Rule's application to these transactions, requires specific disclosures for upsell transactions, and expressly excludes upselling transactions from certain exemptions in the amended Rule; (4) requires that sellers and telemarketers accepting payment by methods other than credit and debit cards subject to certain protections obtain express verifiable authorization from their customers; (5) retains the exemptions for pay-per-call, franchise, and face-to-face transactions, but makes these transactions subject to the national "do-not-call" registry and certain other provisions in the abusive practices section of the Rule; (6) specifies requirements for the use of predictive dialers; (7) requires disclosures and prohibits misrepresentations in connection with the sale of credit card loss protection plans; (8) requires an additional disclosure in connection with prize promotions; (9) requires disclosures and prohibits misrepresentations in connection with offers

that include a negative option feature; (10) eliminates the general media and direct mail exemptions for the telemarketing of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule [1]; (11) requires telemarketers to transmit caller identification information; (12) eliminates the use of post-transaction written confirmation as a means of obtaining a customer's express verifiable authorization when the goods or services are offered on a "free-to-pay conversion" basis; (13) prohibits the disclosure or receipt of the customer's or donor's unencrypted billing information for consideration, except in limited circumstances; and (14) requires that the seller or telemarketer obtain the customer's express informed consent to all transactions, with specific requirements for transactions involving "free-to-pay conversions" and preacquired account information.

Statement of Basis and Purpose

I. Background

A. Telemarketing and Consumer Fraud and Abuse Prevention Act.

The early 1990s saw heightened Congressional attention to burgeoning problems with telemarketing fraud.[2] The culmination of Congressional efforts to protect consumers

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[1] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures ("Franchise Rule"), 16 CFR Part 436.

[2] Statutes enacted by Congress to address telemarketing fraud during the early 1990s include the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. 227 *et seq.*, which restricts the use of automatic dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission ("FCC") to explore ways to protect residential telephone subscribers' privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

against telemarketing fraud occurred in 1994 with the passage of the Telemarketing Act, which was signed into law on August 16, 1994.[3] The purpose of the Act was to combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections.

The Telemarketing Act directed the Commission to issue a rule prohibiting deceptive and abusive telemarketing acts or practices, and specified, among other things, certain acts or practices the FTC's rule must address. The Act also required the Commission to include provisions relating to three specific "abusive telemarketing acts or practices:" (1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods or services, and make other disclosures deemed appropriate by the Commission, including the nature and price of the goods or services sold.[4] Section 6102(a) of the Act not only required the Commission to define and prohibit deceptive telemarketing acts or practices, but also authorized the FTC to define and prohibit acts or practices that "assist or facilitate" deceptive telemarketing.[5] The Act further directed the Commission to consider including recordkeeping requirements in the rule.[6] Finally, the Act authorized state Attorneys

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[3] 15 U.S.C. 6101-6108.

[4] 15 U.S.C. 6102(a)(3)(A)-(C).

[5] Examples of practices that would "assist or facilitate" deceptive telemarketing under the Rule include credit card laundering and providing contact lists or promotional materials to fraudulent sellers or telemarketers. See 60 FR 43842, 43853 (Aug. 23, 1995).

[6] 15 U.S.C. 6102(a)(3).

General, other appropriate state officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC's rule.[7]

B. Original Rule.

The FTC adopted the original Rule on August 16, 1995.[8] The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.[9] Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.[10] In addition, the original Rule requires that telemarketers have consumers' express verifiable authorization before using a demand draft (or "phone check") to debit consumers' bank accounts.[11] The original Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.[12] The original Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.[13] Finally, the original Rule bans telemarketers who offer to arrange loans, provide credit repair services, or

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[7] 15 U.S.C. 6103, 6104.

[8] 60 FR at 43842 (codified at 16 CFR 310 (1995)).

[9] 16 CFR 310.4(d).

[10] 16 CFR 310.3(a)(1).

[11] 16 CFR 310.3(a)(3).

[12] 16 CFR 310.4(c), and 310.4(b)(1)(ii).

[13] 16 CFR 310.3(a)(2).

recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,[14] and prohibits credit card laundering and other forms of assisting and facilitating fraudulent telemarketers.[15]

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (e.g., the Pay-Per-Call Rule,[16] or the Franchise Rule),[17] calls initiated by consumers that are not in response to any solicitation, calls initiated by consumers in response to direct mail, provided certain disclosures are made, and calls initiated by consumers in response to advertisements in general media, such as newspapers or television.[18] Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of non-durable office or cleaning supplies.[19]

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[14] 16 CFR 310.4(a)(2)-(4).

[15] 16 CFR 310.3(b) and (c).

[16] Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("Pay-Per-Call Rule"), 16 CFR Part 308.

[17] 16 CFR 310.6(a)-(c).

[18] 16 CFR 310.6(d)-(f).

[19] 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, common carriers engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance regulated by state law are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); but see discussion below concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

C. Rule Review and Request for Comment.

The Telemarketing Act required that the Commission initiate a Rule Review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.[20] Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a Federal Register notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues related to the "do-not-call" provision of the Rule, and soliciting applications to participate in the forum.[21]

On February 28, 2000, the Commission published a second notice in the Federal Register, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the "do-not-call" provision.[22] In response to this notice, the Commission received 92 comments from representatives of industry, law

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[20] 15 U.S.C. 6108.

[21] 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's "do-not-call" provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later Federal Register notice on February 28, 2000. See 65 FR 10428 (Feb. 28, 2000). Seventeen associations, individual businesses, consumer groups, and law enforcement agencies were selected to engage in the forum's roundtable discussion ("Do-Not-Call" Forum), which was held on January 11, 2000, at the FTC offices in Washington, D.C. References to the "Do-Not-Call" Forum transcript are cited as "DNC Tr." followed by the appropriate page designation.

[22] 65 FR 10428 (Feb. 28, 2000) (the "February 28 Notice"). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).

enforcement, and consumer groups, as well as from individual consumers.[23]

The commenters generally praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters consistently stressed that it is important to retain the Rule. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the "do-not-call" provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike. Commenters identified several changes in the marketplace that had occurred in the five years since the Rule was promulgated and that threatened the Rule's effectiveness. Those changes included increased consumer concern about personal

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[23] A list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the February 28 Notice is attached hereto as Appendix A. Appendix B is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the Notice of Proposed Rulemaking ("NPRM"), discussed below, including supplemental comments and comments submitted on the user fee proposal. References to comments are cited by the commenter's acronym followed by the appropriate page designation. "RR" after the commenter's acronym indicates that the comment was received in response to the Rule Review. "NPRM" after the commenter's acronym indicates that the comment was received in response to the NPRM. "Supp." after the commenter's acronym indicates that the comment was received as a Supplemental Comment. "User Fee" after the commenter's acronym indicates the comment was submitted in response to the request for comments on the Commission's user fee proposal.

privacy,[24] the development of novel payment methods,[25] and the increased use of preacquired account telemarketing [26] and upselling.[27]

Following the receipt of public comments, the Commission held a second forum on July 27 and 28, 2000 ("Rule Review Forum"), to discuss provisions of the Rule other than the "do-

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[24] The past several years have seen a greater public and governmental focus on the "do-not-call" issue. Related to the "do-not-call" issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes. Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of caller identification information) that hinder consumers' attempts to screen calls or make requests to be placed on a "do-not-call" list.

[25] The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a [wide variety of vendors of all types of goods and services. These newly available payment methods in many instances are relatively untested, and may not provide protections for consumers from unauthorized charges.

[26] The practice of preacquired account telemarketing—where a telemarketer acquires the customer'sbilling information prior to initiating a telemarketing call or transaction—has increasingly resulted in complaints from consumers about unauthorized charges. Billing information can be preacquired in a variety of ways, including from a consumer'sutility company, from the consumer in a previous transaction, or from another source. In many instances, the consumer is not involved in the transfer of the billing information and is unaware that the seller possesses it during the telemarketing call.

[27] The practice of "upselling" has also become more prevalent in telemarketing. Through this technique, customers are offered additional items for purchase after the completion of an initial sale. In the majority of upselling scenarios, the seller or telemarketer already has received the consumer's billing information, either from the consumer or from another source.

not-call" provision and to discuss the Rule's effectiveness.[28] Both the "Do-Not-Call" Forum and the Rule Review Forum were open to the public, and time was reserved to receive oral comments from members of the public in attendance. Both proceedings were transcribed and, along with the comments received, placed on the public record.[29]

Based on the record developed during the Rule Review, as well as the Commission's law enforcement experience, the Commission determined to retain the Rule but proposed to amend it to better address recurring abuses and to reach emerging problem areas.

D. The USA PATRIOT Act of 2001.

On October 25, 2001, the USA PATRIOT Act [30] became effective. This legislation contains provisions that have significant impact on the TSR. Specifically, § 1011 of that Act amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fundraising conducted by for-profit telemarketers on behalf of charitable organizations. Because enactment of the USA PATRIOT Act took place after the comment period for the Rule Review closed, the Commission did not raise issues relating to charitable fundraising by telemarketers in the Rule Review.

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarket-

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[28] References to the Rule Review Forum transcript are cited as "RR Tr." followed by the appropriate page designation.

[29] Relevant portions of the entire record of the Rule Review proceeding, including all transcripts and comments, can be viewed on the FTC'swebsite at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

[30] Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

ing Act, 15 U.S.C. § 6106(4), expanding it to cover any "plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call . . . ."

In addition, § 1011(b)(2), among other things, adds a new section to the Telemarketing Act directing the Commission to include new requirements in the "abusive telemarketing acts or practices" provisions of the TSR.[31] Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by specifying that "fraudulent charitable solicitation" is to be included as a deceptive practice under the TSR.

E. Notice of Proposed Rulemaking.

On January 30, 2002, the Commission published its NPRM, proposing revisions to the TSR ("proposed Rule") in order to ensure that consumers receive the protections that the Telemarketing Act mandated, and to effectuate § 1011 of the USA PATRIOT Act.[32] The Commission proposed a number of changes, including creating a national "do-not-call" registry maintained by the FTC, a ban on receiving from or disclosing to a third party a consumer's billing information, a prohibition against blocking caller identification information,

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[31] Specifically, § 1011(b)(2)(d) mandates that the TSR include in its regulation of abusive telemarketing acts and practices "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made." Pub. L. 107-56 (Oct. 26, 2001).

[32] 67 FR 4492 (Jan. 30, 2002).

and a requirement that sellers or telemarketers accepting payment via novel payment methods obtain the customer's express verifiable authorization. During the course of this NPRM proceeding, the Commission received about 64,000 electronic and paper comments from representatives of industry, law enforcement, consumer and privacy groups, and from individual consumers.[33] On June 5, 6 and 7, 2002, the Commission held a forum ("June 2002 Forum") to discuss the issues raised by commenters regarding the FTC's proposed revisions.[34] The forum was open to the public, and time was reserved to receive oral comments from members of the public in attendance. During the forum, the Commission

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[33] Of these, more than forty-five were supplemental comments from organizations and individuals, and about 15,000 supplemental comments were from Gottschalks' customers submitted by Gottschalks. Simultaneous with, but separate from, the NPRM proceeding, the Commission has been exploring possible methods for implementing the proposed national "do-not-call" registry. On February 28, 2002, the Commission published a Request for Information ("RFI") that solicited information from potential contractors on various aspects of implementing the proposed registry. The RFI comment period closed on March 29, 2002. On August 2, 2002, the Commission issued a Request for Quotes to selected vendors. Final proposals were submitted on September 20, 2002, and are being evaluated by Commission staff. On May 29, 2002, the Commission published a Notice of Proposed Rulemaking, soliciting comments on a proposed amendment to the TSR that would establish the methods by which fees for use of the registry would be set. 67 FR 37362 (May 29, 2002). The comment period ended June 28, 2002. The proposed amendment received about forty comments (cited as "[Name of Commenter]-User Fee at [page number]"), virtually all of which argued that the Commission does not have the authority to issue a user fee, or that it was premature to propose a user fee because the Commission did not have sufficient information upon which to base the proposal. The user fee proposal remains under review as the Commission continues to evaluate the issues raised in the comments.

[34] References to the June 2002 Forum transcript are cited as "June 2002 Tr." followed by the appropriate day (I, II, or III, referring to June 5, 6, or 7, respectively) and page designation.

announced that it would accept supplemental comments until June 28, 2002.[35] The forum proceeding was transcribed and placed on the public record. The public record, including many comments and all forum transcripts, has been placed on the Commission's website on the Internet.[36]

Individual consumers generally favored the Commission's proposals, particularly with regard to a national "do-not-call" registry. Consumer groups and state law enforcement representatives also generally supported the proposed amendments, although they expressed concern about the effect of the proposal on state "do-not-call" and other laws. Business and industry commenters generally opposed the proposal, but suggested changes that they believed would make the proposed amendments less burdensome on legitimate business while still achieving the desired consumer protections. Comments from charitable organizations focused primarily on the FTC proposal which would require for-profit telemarketers who solicit on behalf of charitable organizations to comply with the proposed "do-not-call" registry. Charitable organizations consistently opposed such a requirement. The comments and the basis for the Commission's decision on the various recommendations are analyzed in detail in Section II below.

F. The Amended Rule.

The Commission has carefully reviewed the entire record developed in its rulemaking proceeding. The record, as well as the Commission's law enforcement experience, leave little

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[35] June 2002 Tr. II at 254. References to the supplemental comments received are cited as "[Name of Commenter]-Supp. at [page number]."

[36] Much of the record in this proceeding can be viewed on the FTC's website at http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

doubt that important changes have occurred in the marketplace, and that modifications to the original Rule are necessary if consumers are to receive the protections that Congress intended to provide when it enacted the Telemarketing Act. Based on that record and on the Commission's law enforcement experience, the Commission has modified the proposed Rule published in the NPRM and now promulgates this amended Rule, as described in this SBP.

The Commission's decision to retain certain provisions of the original Rule while supplementing or amending others is made pursuant to the Rule Review requirements of the Telemarketing Act,[37] and pursuant to the rulemaking authority granted to the Commission by that Act to protect consumers from deceptive and abusive practices,[38] including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy.[39] The Commission's decision to amend the original Rule also is made pursuant to the authority granted to the Commission by § 1011 of the USA PATRIOT Act.

As discussed in detail herein, the Commission believes that it is necessary to amend the original Rule to ensure that the Telemarketing Act's goals are met—that is, encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive or deceptive. The record in this rulemaking proceeding demonstrates that many of the changes in the marketplace that have occurred since the original Rule was promulgated have led to the growth of deceptive and abusive practices in areas not adequately addressed by the original Rule. The amended Rule addresses these practices by responding to the changes in the marketplace in a manner consistent with the intent of

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[37] 15 U.S.C. 6108.

[38] 15 U.S.C. 6102(a)(1) and (a)(3).

[39] 15 U.S.C. 6102(a)(3)(A).

Congress in enacting the Telemarketing Act and § 1011 of the USA PATRIOT Act. The Commission believes that the amended Rule strikes a balance, maximizing consumer protections without imposing unnecessary burdens on the telemarketing industry. Each of the amendments is discussed in detail in this SBP. A summary of the major changes from the original Rule is set forth below. The amended Rule:

- Supplements the current company-specific "do-not-call" provision with a provision that will empower a consumer to stop calls from all companies within the FTC's jurisdiction by placing his or her telephone number on a central "do-not-call" registry maintained by the FTC, except when the consumer has an "established business relationship" with the seller on whose behalf the call is made;

- Permits consumers who have put their numbers on the national "do-not-call" registry to provide permission to call to any specific seller by an express written agreement;

- Explicitly exempts solicitations to induce charitable contributions via outbound telephone calls from coverage under the national "do-not-call" registry provision;

- Modifies § 310.3(a)(3) to require express verifiable authorization for all transactions except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E;

- Modifies § 310.3(a)(3)(iii), the provision allowing a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the consumer prior to submitting the consumer's billing information for payment;

• Mandates disclosures in the sale of credit card loss protection, and prohibits misrepresenting that a consumer needs offered goods or services in order to receive protections he or she already has under 15 U.S.C. § 1643 (limiting a cardholder's liability for unauthorized charges on a credit card account);

• Explicitly mandates that all required disclosures in § 310.3(a)(1) and § 310.4(d) be made truthfully;

• Expands upon the current prize promotion disclosures to include a statement that any purchase or payment will not increase a consumer's chances of winning;

• Prohibits disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing, except when the disclosure or receipt is to process a payment for goods or services or a charitable contribution pursuant to a transaction;

• Prohibits causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor;

• Sets out guidelines for what evidences express informed consent in transactions involving preacquired account information and "free-to-pay conversion" features;

• Requires telemarketers to transmit the telephone number, and name, when available, of the telemarketer to any caller identification service;

• Prohibits telemarketers from abandoning any outbound telephone call, and provides, in a safe harbor provision, that to avoid liability under this provision, a telemarketer must: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales

representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;

• Extends the applicability of most provisions of the Rule to "upselling" transactions;

• Prohibits denying or interfering in any way with a consumer's right to be placed on a "do-not-call" list;

• Requires maintenance of records of express informed consent and express agreement;

• Narrows certain exemptions of the Rule;

• Clarifies that facsimile transmissions, electronic mail, and other similar methods of delivery are direct mail for purposes of the direct mail exemption; and

• Modifies various provisions throughout the Rule to effectuate expansion of the Rule's coverage to include charitable solicitations, pursuant to Section 1011 of the USA PATRIOT Act, and adds new mandatory disclosures and prohibited misrepresentations in charitable solicitations.

G. Proposed Rule Adopted with Some Modifications.

Based on the entire record in this proceeding, the amended Rule adopted by the Commission is substantially similar to the proposed Rule. However, the amended Rule contains some important differences from the proposed Rule. These further modifications to the original Rule were based on the recommendations of commenters and on the Commission's more comprehensive law enforcement experience in certain areas over the months since publishing the NPRM.

The major differences between the proposed Rule and the amended Rule adopted here are as follows:

• The definition of "charitable contribution" no longer contains exceptions for religious and political groups;

• Sellers who have an "established business relationship" with the consumer are exempted from the national "do-not-call" registry;

• For-profit telemarketers who solicit charitable contributions are exempted from the national "do-not-call" registry, but remain subject to the entity-specific "do-not-call" provision;

• The original Rule's definition of "outbound call" has been reinstated, and the proposed Rule modified to require specific disclosures in an upsell transaction;

• Disclosures regarding negative option features are required;

• Express verifiable authorization is required for all payments, except those made by a credit or debit card subject to certain statutorily-mandated consumer protections;

• For express oral authorization to be deemed verifiable, a seller must ensure the customer's or donor's receipt of the date the charge will be submitted for payment (rather than the date of the payment) and identify the account to be charged with sufficient specificity such that the customer or donor understands what account is being used to collect payment (rather than provide the account name and number);

• The use of written post-sale confirmations is permitted, subject to the requirement that such confirmations be clearly and conspicuously labeled as such; however, this method is not permitted in transactions involving a "free-to-pay conversion" feature and preacquired account information;

• In charitable solicitations, the prohibited misrepresentation regarding the percentage or amount of any charitable contribution that will go to a charitable organization or program is no longer delimited by the phrase "after any administrative or fundraising expenses are deducted;"

• The Rule now specifies that billing charges to a consumer's account without the consumer's authorization is an abusive practice and a Rule violation; and the Rule now requires that a customer's express informed consent be provided in every transaction;

• The ban on the transfer of consumers' billing information has been replaced with a ban on transferring unencrypted consumer account numbers;

• The failure to transmit caller identification information is prohibited, rather than the affirmative blocking of such information;

• Abandoned calls are prohibited, subject to a "safe harbor" that requires a telemarketer to: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;

• Records of express informed consent or express agreement must be maintained;

• The exemptions for certain kinds of calls are explicitly unavailable to upselling transactions;

• The exemption for business-to-business telemarketing is once again available to telemarketing of

> Web services and Internet services, as well as the solicitation of charitable contributions.

II. Discussion of the Amended Rule

The amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability), although § 310.8 (Severability) has been renumbered as § 310.9 in the amended Rule. Section 310.8 of the amended Rule is now reserved.

A. Section 310.1—Scope of Regulations.

Section 310.1 of the amended Rule states that "this part [of the CFR] implements the [Telemarketing Act], as amended," reflecting the amendment of the Telemarketing Act by § 1011 of the USA PATRIOT Act.[40] This section discusses comments received regarding the implementation of the USA PATRIOT Act amendments as well as other issues relating to the scope of coverage of the TSR.

Effect of the USA PATRIOT Act.

As noted in the NPRM, § 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6306(4), by inserting the underscored language:

> The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services *or a charitable contribution, donation, or gift of money or any other thing of value* by use of one or more telephones and which involv[illegible] more than one interstate telephone call. . . .

In addition, § 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in

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[40] 15 U.S.C. 6101-6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107-56 (Oct. 26, 2001).

the "abusive telemarketing acts or practices" provisions of the TSR:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by inserting the underscored language:

> The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices *which shall include fraudulent charitable solicitations* and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

Notwithstanding the amendment of these provisions of the Telemarketing Act, neither the text of § 1011 nor its legislative history suggests that it amends § 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) of the Act states:

> Except as otherwise provided in sections 6102(d) [with respect to the Securities and Exchange Commission], 6102(e) [Commodity Futures Trading Commission], 6103 [state Attorney General actions], and 6104 [private consumer actions] of this title, this chapter shall be enforced by the Commission under the Federal Trade

> Commission Act (15 U.S.C. § 41 *et seq.*). *Consequently, no activity which is outside of the jurisdiction of that Act shall be affected by this chapter. (emphasis added).*[41]

One type of "activity which is outside the jurisdiction" of the FTC Act, as interpreted by the Commission and federal court decisions, is that conducted by non-profit entities. Sections 4 and 5 of the FTC Act, by their terms, provide the Commission with jurisdiction only over persons, partnerships, or "corporations organized to carry on business for their own profit or that of their members." [42]

Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act

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[41] Section 6105(b) reinforces the point made in § 6105(a), as follows:

> "The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and *with the same jurisdiction*, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. § 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the same privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and *with the same jurisdiction*, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter." (emphasis added).

[42] Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members* . . . ." 15 U.S.C. 44 (emphasis added).

compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.[43] The USA PATRIOT Act brings the Telemarketing Act's jurisdiction over charitable solicitations in line with the jurisdiction of the Commission under the FTC Act by expanding the Rule's coverage to include not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.

The Commission received numerous comments regarding the change in scope to the TSR required by the USA PATRIOT Act amendments of the Telemarketing Act. Some comments supported the Commission's interpretation of the USA PATRIOT Act amendments, and the coverage of for-profit telemarketers who solicit on behalf of exempt charitable organizations.[44] However, the majority of

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[43] A fundamental tenet of statutory construction is that "a statute should be read as a whole, . . . [and that] provisions introduced by the amendatory act should be read together with the provisions of the original section that were . . . left unchanged . . . as if they had been originally enacted as one section." 1A NORMAN J. SINGER, SUTHERLAND STATUTES & STAT. CONSTR. § 22:34 (6th ed. 2002), *citing, inter alia, Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); *Am. Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196 (2d Cir. 1974); *Kirchner v. Kansas Tpk. Auth.*, 336 F.2d 222 (10th Cir. 1964); *Nat'l Ctr. for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D.S.C. 1980); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989). Thus, in construing a statute and its amendments, "[e]ffect is to be given to each part, and they are to be int erpreted so that they do not conflict." *Id.*

[44] *See, e.g.*, AARP-NPRM at 4; AFP-NPRM at 3 (arguing that the USA PATRIOT Act gives the FTC jurisdiction over for-profit telemarketers soliciting on behalf of non-profits, agreeing that the disclosures required by amended Rule § 310.4(e) are necessary, and noting that the disclosures mirror the disclosures required by AFP's code of ethics); ASTA-NPRM at 1; Make-a-Wish-NPRM, *passim*; MBNA-NPRM at 6 (the Rule

commenters who addressed this issue believed the Commission had misinterpreted the mandate of the USA PATRIOT Act amendments. Law enforcement agencies and consumer groups, including NAAG and NASCO, generally expressed the view that the Commission had underestimated the jurisdictional powers conferred on it by the USA PATRIOT Act amendments, and urged that the Rule apply not only to for-profit solicitors who call on behalf of charities, but also to the charities themselves.[45] These commenters argued that the language of the USA PATRIOT Act and its legislative history do not support limiting the applicability of the TSR to telemarketers who call on behalf of non-profits, rather than extending it to cover charitable organizations as well.[46]

On the other hand, most non-profit organizations that commented argued that the Commission's interpretation of the USA PATRIOT Act amendments was too expansive. Several of these commenters argued that in adopting § 1011 of the USA PATRIOT Act, "Congress meant only to apply certain disclosure requirements—and not the other aspects of the Rule—to professional fundraisers for charities and to for-profit entities soliciting charitable contributions for their own philanthropic purposes."[47] Others suggested that "Congress

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amendments to effectuate the USA PATRIOT Act's provisions "reflect Congress' intent and are limited in scope and impact while providing important consumer benefits.").

[45] *See, e.g.*, NAAG-NPRM at 50-51; NASCO-NPRM at 3-4.

[46] *See* NAAG-NPRM at 50-51; NASCO-NPRM at 3-4 (the USA PATRIOT Act refers to "fraudulent charitable solicitations," and requires disclosures by "any person" engaged in telemarketing; also noting that the USA PATRIOT Act was passed in the wake of September 11, 2001, and in response to misrepresentations by non-profits as well as their for-profit telemarketers.).

[47] DMA-NonProfit-NPRM at 4. *See also* ACE-NPRM at 1-2; ERA-NPRM at 45; IUPA-NPRM at 21-22.

intended only to address bogus charitable solicitation where the non-profit or charitable cause or organizational scheme itself is of a criminal or fraudulent nature."[48] These commenters cite statements made by the legislation's chief sponsor to the effect that concerns about fraudulent charities prompted him to introduce the legislation.[49]

The Commission believes that concerns about bogus charitable fundraising in the wake of the events of September 11, 2001, in large measure propelled passage of § 1011 of the USA PATRIOT Act.[50] But the fact remains that Congress did more than impose upon the solicitation of charitable contributions by for-profit telemarketers prohibittions against misrepresentation and basic disclosure obligations. Indeed, the USA PATRIOT Act amendments alter the scope of the entire TSR by altering the key definition of the statute—"telemarketing"—to encompass charitable solicitation. Moreover, the text of § 1011 expressly directs the Commission to address both deceptive and abusive acts or

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[48] Not-For-Profit Coalition-NPRM at 26. *See also* Community Safety-NPRM at 2.

[49] *See* Not-For-Profit Coalition-NPRM at 27-28; DMA-NonProfit-NPRM at 5.

[50] *See* letter dated June 14, 2002, from Senator Mitch McConnell to FTC Chairman Timothy Muris, commenting on the NPRM and stating:

> "In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations. The bill also takes important steps to combat deceptive charitable solicitations by requiring telemarketers to make common sense disclosures such as the charity's identity and address at the beginning of the phone call. . . . When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal "do-not-call" list, and certainly not a list that applied to charitable organizations or their authorized agents."

practices.[51] Thus, there is no textual support for the notion that § 1011 excludes from its grant of authority over charitable solicitations the power to prohibit deceptive or abusive practices.[52]

Some non-profit commenters also argued that the Commission's interpretation of the USA PATRIOT Act produced, in effect, a double standard, regulating charities who outsource their telemarketing, but not those who conduct their own telemarketing campaigns.[53] Others opined that this bifurcated regulatory scheme was not intended by Congress when it passed the USA PATRIOT Act amendments to the Telemarketing Act.[54] These commenters argued that this distinction penalizes charities (by subjecting them to regulation) merely because they choose to outsource an administrative function. Some argued further that the increased costs of regulatory compliance will not be borne by the for-profit telemarketers, but rather by charities themselves, negatively impacting their ability to carry out their primary mission.[55]

Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make

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[51] Pub. L. 107-56 (Oct. 26, 2001).

[52] It is a tenet of statutory construction that "an amendatory act is not to be construed to change the original act . . . further than expressly declared or necessarily implied." SUTHERLAND STAT. CONSTR., note 43 above, at § 22:30 (citations omitted). The Commission believes the necessary implication of modifying the definition of "telemarketing" in the USA PATRIOT Act is to have all provisions of the Rule apply to charitable solicitations.

[53] *See, e.g.*, March of Dimes NPRM at 2.

[54] *See* IUPA-NPRM at 1.

[55] *See* Reese-NPRM at 2.

direct regulation of non-profit organizations possible. Nevertheless, reading the amendatory act together with the original language, as it must, the Commission has sought to give full effect to the directive of Congress set forth in the USA PATRIOT Act amendments.

Another argument raised by large numbers of non-profit commenters is that regulating for-profit telemarketers who solicit on behalf of non-profits, and in particular subjecting them to the requirements of the "do-not-call" registry provision, is unfair given the other limitations on the Commission's jurisdiction.[56] These commenters suggested that the result of this scheme would be to allow commercial calls that consumers find intrusive, while banning calls from charities, even those with whom a donor has a past relationship.[57] As explained in greater detail in the discussion of the applicability of the "do-not-call" provisions to charitable solicitation telemarketing, careful consideration of this argument has led the Commission to exempt solicitations to induce charitable contributions via outbound telephone calls from the "do-not-call" registry provision. Only the less restrictive entity-specific "do-not-call" provision included in the original Rule will apply to charitable solicitation telemarketing. However, both the entity-specific "do-not-call" provisions and the "do-not-call" registry provisions apply to commercial telemarketing to induce purchases of goods or services. This approach fulfills the Commission's intention that the TSR be consistent with First Amendment principles, whereby a higher degree of protection is extended to charitable solicitation than to commercial solicitation.

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[56] *See, e.g.*, FOP-NPRM at 2; HRC-NPRM at 1; Italian American Police-NPRM at 1; Lautman-NPRM at 2; Leukemia Society-NPRM at 1-2; NCLF-NPRM at 1; Angel Food-NPRM at 1; North Carolina FFA-NPRM at 1; SO-CT-NPRM at 1; SO-NJ-NPRM at 1; SO-WA-NPRM at 1; Reese-NPRM at 2; SHARE-NPRM at 3; Stage Door-NPRM at 1.

[57] *See, e.g.*, PAF-NPRM at 1; AOP-Supp. at 1; Chesapeake-Supp. at 1.

Moreover, as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions.

Commenters' Proposals.

Noting the Commission's jurisdictional limitations with respect to banks, MBNA requested that the Rule explicitly state that it is "inapplicable to entities exempt from coverage under § 5(a)(2) of the [FTC Act]."[58] MBNA also recommended that the Rule extend this exemption to "entities acting on behalf of banks . . . because such entities are regulated by the Bank Service Company Act, 15 U.S.C. § 45(a)(2), concerning services they provide for banks."[59] MasterCard challenged the Commission's statement that it can regulate third-party telemarketers who call on behalf of a bank, and urged that the Commission explicitly exempt "any bank subsidiary or affiliate performing services on behalf of a bank.[60] ABA recommended that the amended Rule clarify that "non-bank operating subsidiaries of banks as defined by the banking agencies" are exempt.[61]

The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, "a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered" by this Rule.[62] This reading is

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[58] MBNA-NPRM at 2. *Accord* Fleet-NPRM at 2 (arguing that the Office of the Comptroller of the Currency already provides significant guidance to banks on managing risks that may arise from their business relationships with third parties); AFSA-NPRM at 3.

[59] MBNA-NPRM at 2. *See also* AFSA-NPRM at 3.

[60] MasterCard-NPRM at 13-14. *Accord* Citigroup-NPRM at 11.

[61] ABA-NPRM at 3.

[62] 60 FR at 43843, *citing, inter alia Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) (holding that the air carrier exemption from

consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.[63] Furthermore, the Commission's authority was clarified in § 133 of the Gramm-Leach-Bliley Act ("GLBA"), which states that "[a]ny person that . . . is controlled directly or indirectly . . . by . . . any bank . . . ([as] defined in section 3 of the Federal Deposit Insurance Act) *and is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by*" the FTC under the FTC Act.[64] Most recently, a federal district court held that, under this language, the Rule applies to telemarketing by a mortgage subsidiary of a national bank. As the court stated, "the definition of 'bank' identified by Congress simply does not include the subsidiaries of banks."[65]

The Commission believes it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, *i.e.*, that its jurisdiction for purposes of the TSR is conterminous with its jurisdiction under the FTC Act, and therefore declines to include an express statement of this fact in the Rule. Further, the Commission declines to adopt the interpretation of some commenters that the FTC Act itself exempts non-bank entities

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the FTC Act did not apply to a firm publishing schedules and fares for air carriers, which was not itself an air carrier); FTC/Direct Mktg. Ass'n., *Complying with the Telemarketing Sales Rule* (Apr. 1996) ("TSR Compliance Guide") at 7.

[63] *See, e.g., Official Airline Guides*, note 62 above; *FTC v. Saja*, 1997-2 CCH (Trade Cas.) P 71,952 (D. Ariz. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080 (1994).

[64] GLBA, Pub. L. 106-102, 113 Stat. 1383, Title I, § 133(a), 15 U.S.C. 6801-6810 (2001).

[65] *Minnesota v. Fleet Mortgage Co rp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (noting that the applicable definition under the Federal Deposit Insurance Act ("FDIA") is "any national bank, State bank, District Bank, and any Federal branch and insured branch" *citing* FDIA, 12 U.S.C. 1813(a)(1)(A)).

based on their affiliation with or provision of services to exempt banks, and the recommendations of those commenters who sought an exemption from the Rule for bank subsidiaries or agents. To do so would be contrary to the Commission's interpretation of its jurisdictional boundaries, and would unnecessarily limit the reach of the Rule.[66]

In a similar argument, SBC asserted that, contrary to the Commission's stated position, the Commission's lack of jurisdiction over common carriers engaged in common carriage activity extends to their affiliates and their agents engaged in telemarketing on their behalf.[67] SBC cites no authority for this proposition, and the Commission is aware of none. SBC claims that the cases cited by the Commission in the NPRM [68] in support of its authority provide no support for Commission jurisdiction over a common carrier's agent assisting in selling common carrier services.[69] In fact, in one of those cases, the publisher of what the court described as "the primary market tool of . . . virtually every (air) carrier . . . in the United States" was held not to be exempt under the exemption for air carriers.[70] Accordingly, the Commission declines to revise its position.

Citigroup requested that the amended Rule clarify that certain financial services providers, such as insurance underwriters and registered broker-dealers, are exempt from

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[66] This approach is consistent with that laid out in the SBP of the original Rule. *See* 60 FR at 43483.

[67] SBC-NPRM at 2, 4-5.

[68] 67 FR at 4407 (*citing* 60 FR at 43843, *citing FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), *see* note 62 above.

[69] SBC-NPRM at 4-5.

[70] *Official Airline Guides, see* note 62 above. *See also* cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

the Rule.[71] NAIFA requested similar clarification regarding insurance companies, as well as an explicit statement of exemption in the Rule.[72] The Commission believes that the explicit statement of the Commission's jurisdictional limitation over broker-dealers is abundantly clear in the Telemarketing Act itself; [73] thus, it is unnecessary to exempt them in the Rule. Similarly, the Commission believes its jurisdictional limitations regarding the business of insurance are clear, and thus no express exemption for these entities is necessary.[74]

In contrast to these requests to circumscribe or restate the Commission's jurisdiction under the Rule, a number of commenters urged the expansion of the Rule's scope beyond its current boundaries. As NCL put it, "[b]ecause the Commission's general jurisdiction does not include significant segments of the telemarketing industry, such as common carriers and financial institutions, the Rule does not provide comprehensive protection for consumers or a level playing field for marketers." [75] Others argued that the Commission should assert jurisdiction over intrastate calls as well as interstate calls.[76]

As the Commission stated in the NPRM, "the jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits." [77]

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[71] *See* Citigroup-NPRM at 10.

[72] *See* NAIFA-NPRM at 1-2.

[73] 15 U.S.C. 6102(d)(2).

[74] See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

[75] NCL-NPRM at 2. *See also* Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

[76] FCA-NPRM at 2.

[77] 67 FR at 4497.

Thus, absent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.[78] Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.[79]

Regarding the suggestion that the Commission regulate intrastate telemarketing calls, the Commission notes that, pursuant to the definition of "telemarketing" included in the Telemarketing Act, 15 U.S.C. § 6106(4), the Commission only has authority to regulate "a plan, program, or campaign which is conducted . . . by use of one or more telephones and which involves *more than one interstate call*." (emphasis added).

Finally, one commenter suggested that the Commission expressly state its jurisdiction over prerecorded telephone solicitations and facsimile advertisements.[80] The Commission

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[78] *Id.*

[79] As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well." 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that "no activity which is outside the jurisdiction of that Act shall be affected by this chapter." 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

[80] *See* Worsham-NPRM at 6.

believes that sales calls using pre-recorded messages may fall within the Rule's definition of "telemarketing," provided the call is not exempt and provided the call meets the other criteria of "telemarketing." Thus, a sales call using a prerecorded message may be "tele-marketing" if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call. However, the fact that prerecorded sales calls may be "telemarketing" does not affect the fact that such calls are already prohibited, except with the consumer's prior express consent, under regulations promulgated by the FCC pursuant to the TCPA.[81] Similarly, FCC regulations already prohibit unsolicited facsimile advertisements,[82] although facsimiles also are a form of direct mail subject to the TSR. The Commission notes in the discussion of § 310.6(b)(6) below that it considers facsimiles to be a form of direct mail solicitation. Thus, under § 310.6(b)(6), a seller using a facsimile advertisement to induce calls from consumers may not claim the direct mail exemption unless the facsimile truthfully discloses the material information listed in § 310.3(a)(1) (or contains no material misrepresent-ation regarding any item contained in § 310.3(d) if the solicitation is for a charitable contribution).

B. Section 310.2—Definitions.

The amended Rule retains the following definitions from the original Rule unchanged, apart from renumbering: "acquirer," "Attorney General," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card

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[81] 47 CFR 64.1200(a)(2).

[82] 47 CFR 64.1200(a)(3).

system," "customer," [83] "investment opportunity," [84] "merchant," "merchant agreement," "person," "prize," "prize promotion," "seller," and "State."

Based on the record developed in this matter, the Commission has determined to retain the following definitions from the proposed Rule unchanged, apart from renumbering: "caller identification service," "donor," "telemarketer," [85] and "telemarketing." The amended Rule

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[83] VISA stated that the definition of "customer" is too broad, encompassing not only "the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device." VISA-NPRM at 7. Although the term "customer," defined to mean "any person who is or may be required to pay for goods or services offered through telemarketing," is broad in scope, the Commission believes this breadth is necessary to effect the purposes of the Rule. Further, the Commission believes that the term "customer," taken in context of the various Rule sections in which it is used, is not confusing. Therefore, the Commission makes no change in the amended Rule to the definition of "customer."

[84] One commenter recommended that the Commission clarify that an investment vehicle whose main attribute is that it provides tax benefits would be considered an "investment opportunity" under the Rule. Thayer-NPRM at 6. The Commission believes that such a tax-advantaged investment would come under the present definition, which is predicated on representations about "past, present, or future income, profit, or appreciation." The Commission believes that any such investment opportunity would only result in a tax advantage because of its ability to produce income or appreciation, regardless of whether that income is positive (and tax-deferred or tax-exempt) or negative (resulting in deductible losses). Thus, the Commission has retained the original definition of "investment opportunity" in the amended Rule.

[85] One commenter expressed concern that "a company that sells telemarketing services to sellers, but does not maintain any calling facilities itself, instead subcontracting the actual telephoning to individuals" might not fall within the definition of "telemarketer." Patrick-NPRM at 2. The Commission disagrees, and believes that regardless of whether an entity maintains a physical call center, it would

modifies the definitions put forth in the NPRM for the terms "billing information," "charitable contribution," "material," and "outbound telephone call." Finally, the amended Rule adds five definitions that were not included in the NPRM proposal. They are: "established business relationship," "free-to-pay conversion," "negative option feature," "preacquired account information," and "upselling." The Commission discusses each of these definitions below, along with the comments received regarding them, and the Commission's reasoning in making a final determination regarding each of these definitions.[86]

§ 310.2(c) —Billing information

The proposed Rule included a definition of the term "billing information," which was used in proposed § 310.3(a)(3), the express verifiable authorization provision, and proposed § 310.4(a)(5), the section that addressed preacquired account telemarketing. Under the definition proposed in the NPRM, the term "billing information" encompassed "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, or similar account, utility bill, mortgage loan account, or debit card." [87]

The Commission received numerous comments regarding this definition as it pertained to the express verifiable authorization and preacquired account provisions of the proposed Rule. The use of the term in the express verifiable

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be a "telemarketer" for purposes of the Rule if "in connection with telemarketing, [it] initiates or receives telephone calls to or from a customer or donor." Amended Rule § 310.2(bb).

[86] The definitions proposed in the NPRM for "express verifiable authorization," "Internet services," and "Web services" have been deleted from the amended Rule because they are no longer necessary in light of certain substantive modifications in the amended Rule.

[87] *See* proposed Rule § 310.2(c), and discussion, 67 FR at 4498-99.

authorization provision drew less comment, perhaps because that provision merely required that the customer or donor receive such billing information if express verifiable authorization of payment is to be deemed verifiable.[88] Comments from consumer groups generally favored the "billing information" definition, noting that the breadth of the term would prove beneficial to consumers.[89] AARP, for example, stated that the definition, as employed in the proposed preacquired account telemarketing provision, "is broad enough so as not to leave any doubt in the mind of the telemarketer regarding what can and cannot be shared."[90] Law enforcement representatives and some consumer groups expressed their concern that, as broad as the definition might seem, it should be further expanded to encompass encrypted data, and other kinds of information that can allow access to a consumer's account.[91] Industry commenters, on the other

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[88] As discussed below, in the section explaining the express verifiable authorization provision (i.e., § 310.3(a)(3)), commenters' concerns regarding billing information in the express verifiable authorization provision focused on the dangers of disclosure of consumers' account numbers.

[89] *See* NCLC-NPRM at 13; LSAP-NPRM at 5 (approved of definition, but also suggested changing "such as" to "including but not limited to").

[90] AARP-NPRM at 7.

[91] Specifically, NAAG noted: "[T]he Gramm Leach Bliley Act ("GLBA") has resulted in the common use of reference numbers and encrypted numbers to identify consumer accounts in preacquired account telemarketing. These types of account access devices definitely should be included in the list of examples. Failure to include encrypted numbers within the scope of the Rule's definition of 'billing information' would render the Rule useless as a device to combat the ills of preacquired account telemarketing." NAAG-NPRM at 38. *See also* NACAA-NPRM at 5-6 ("consider providing a non-exclusive list of such information, based upon technologies in place today. Thus, name, account number, telephone number, married and maiden names of parents, social security number, passwords to accounts and PINs, and encrypted versions of this information, with or without the encryption [key], should all be prohibited

hand, argued precisely the opposite, requesting that the definition be narrowed and that it specifically exclude encrypted data,[92] or other specified items unique to that commenter's business practices.[93] Instead, industry commenters recommended, "billing information" should be limited to account information that "in and of itself, is sufficient to effect a transaction" against a consumer's account.[94] Virtually all of these comments were made in the

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from use in any trasaction but the immediate one in which the consumer is engaged."); NCLC-NPRM at 13.

[92] Citigroup-NPRM at 7-8; Household Auto-NPRM at 2 ("Although the specific language of the proposed definition does appear to be consistent with the Commission's GLBA interpretation, the explanation of the term in the [NPRM] is broader and creates a conflict with the GLBA interpretation . . . . To avoid such a conflict, we suggest that the Commission clarify that the term . . . includes only account numbers and specifically excludes encrypted account numbers."). *Accord* ABIA-NPRM at 2; Roundtable-NPRM at 8 ("The Roundtable is concerned that this definition is so broad that it could be construed to restrict the sharing of publicly available identifying information, such as a consumer's name, phone number and address."). *See also* AFSA-NPRM at 11-12; Advanta-NPRM at 3; ARDA-NPRM at 3; Assurant-NPRM at 3; Capital One-NPRM at 8-9; Cendant-NPRM at 7; Citigroup-NPRM at 7; E-Commerce Coalition-NPRM at 2; ERA-NPRM at 24; IBM-NPRM at 10; MPA-NPRM at 23, n.23; MasterCard-NPRM at 8; Metris-NPRM at 7; VISA-NPRM at 6.

[93] *See, e.g.*, Green Mountain-NPRM at 31 ("If the Commission intends to adopt its proposal to amend the TSR to add a new Section 310.4(a)(5) to ban the use of preacquired billing information obtained from third parties, it should exempt names, addresses, electricity meter identifiers, and electricity usage patterns from its definition of 'billing information.'")

[94] IBM-NPRM at 10. ARDA argued that information that would fall within the definition of "billing information"—such as a customer's or donor's date of birth—may be collected during a call for purposes other than to effect a charge. ARDA cited examples including "eligibility to enter a contest or drawing" or "demographic purposes." ARDA-NPRM at 3. ARDA then asserted that, while this information may not be gathered during a call in which a billing occurs, or used for billing purposes in the first instance, it could be passed along to other parties for marketing or

context of the proposed Rule provision regarding preacquired account telemarketing, which would have prohibited the disclosure or receipt of "billing information" except when provided by the customer or donor to process payment.

As noted below in the discussions of amended Rule §§ 310.4(a)(5) and (6), the Commission has tailored its approach to preacquired account telemarketing, thereby addressing many of the concerns raised by commenters on both sides regarding the proposed definition of "billing information." The amended Rule's approach to preacquired account telemarketing—which no longer focuses on the sharing of "billing information" in anticipation of telemarketing, but instead prohibits "[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor"—obviates the concerns about the breadth of the term, and whether it includes or excludes encrypted account numbers.[95]

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other purposes. Id. While the Commission recognizes that information like date of birth has marketing uses beyond access to consumer accounts for billing purposes, the Commission finds it improbable at best that collection or confirmation of date of birth, or similar piece of information, as a proxy for consent to be charged for a purchase or donation would satisfy the "express informed consent" requirements of amended Rule § 310.4(a)(6), discussed below.

[95] During the Rule Review, industry argued the term was so broad it might mean that sellers and telemarketers could not share customer names and telephone numbers for use in telemarketing. *See, e.g.*, Advanta-NPRM at 3; Roundtable-NPRM at 8. Industry also argued that encrypted data should not be included in the definition of "billing information," because such data by itself does not allow a charge to be placed on a consumer's [account, and because sharing it is permitted by the GLBA. *See, e.g.*, Cendant-NPRM at 7; E-Commerce Coalition-NPRM at 2; MPA at 23, n.23. These arguments have been addressed by the Commission's revised approach to preacquired account telemarketing, which focuses not on the sharing of account information—except in the very limited area of sale of unencrypted account numbers—but on the harm that results from certain practices in preacquired account telemarketing, i.e., unauthorized

However, the amended Rule includes a definition of "preacquired account information," which encompasses both encrypted and unencrypted account information, to address specifically the practice of preacquired account telemarketing.[96]

Consequently, after consideration of the record in this proceeding, and in light of the more focused approach to the provisions in which the term is used, the Commission has decided to retain the proposed definition of "billing information," with a minor modification. The definition now encompasses "any data that enables any person to obtain access to a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card." (emphasis added). The Commission believes that this syntactical modification, substituting the phrase "that enables any person to obtain access" for the phrase "that provides access," makes the definition more precise and somewhat easier to understand. The definition retains the broad scope of its predecessor in order to capture the myriad ways a charge may be placed against a consumer's account,[97] yet has more limited effect in the context of the approach adopted in the amended Rule to address preacquired account telemarketing and express verifiable authorization.

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charges. Moreover, in those instances where there has been the strongest history of abuse, sellers and telemarketers are required to obtain part or all of the customer's account number directly from the customer.

[96] *See* amended Rule § 310.2(w), and related discussion below.

[97] The record shows that a telemarketer or seller may provide anything from complete account number to mother's maiden name to initiate a charge for a telemarketing transaction, depending on its relationship with another seller, financial institution, or billing entity. *See, e.g.*, Assurant-NPRM at 4.

§ 310.2(d) —Caller identification service

The definition of "caller identification service" comes into play in § 310.4(a)(7) of the amended Rule, discussed below. In the NPRM, the Commission proposed to define "caller identification service" to mean "a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone." As the Commission explained in the NPRM, the Commission intends the definition of "caller identification service" to be sufficiently broad to encompass any existing or emerging technology that provides for the transmission of calling party information during the course of a telephone call.[98] Those few commenters who addressed the definition supported the Commission's proposal.[99] Therefore, the amended Rule adopts § 310.2(d), the definition of "caller identification service," unchanged from the proposal.

§ 310.2(e) —Charitable contribution

The original Rule did not include a definition of "charitable contribution" because originally the term "telemarketing" in the Telemarketing Act, which determined the scope of the TSR, was defined to reach telephone solicitations only for the purpose of inducing sales of goods or services.[100] The proposed Rule added a definition of the term "charitable

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[98] 67 FR at 4499.

[99] *See, e.g.*, EPIC-NPRM at 11; ARDA-NPRM at 4. ARDA suggested that the definition be expanded to allow transmission of the name and number of "any party whom the telephone subscriber may contact" regarding being placed on the company's "do-not-call" list. As noted in the subsequent discussion of this provision, § 310.4(a)(7) of the amended Rule permits telemarketers to substitute a customer service number on the caller identification transmission.

[100] 15 U.S.C. 6106(4).

contribution" because § 1011 of the USA PATRIOT Act amended the Telemarketing Act to specify that "telemarketing" now includes not only calls to induce purchases of goods or services but also calls to induce "*a charitable contribution, donation, or gift of money or any other thing of value.*" [101] The Commission has determined that the term "charitable contribution," defined for the purposes of the Rule to mean "any donation or gift of money or any other thing of value" succinctly captures the meaning intended by Congress. Therefore, the Commission has retained this definition from the proposed Rule. It has, however, determined to modify the proposed definition to eliminate the exemptions included in the proposed Rule.

The proposed definition in the NPRM expressly excluded donations or gifts of money or any other thing of value solicited by or on behalf of "political clubs, committees, or parties, or constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government." [102] This proposed exemption drew strong comment and criticism. NASCO recommended that a definition of "constituted religious organizations" be included in the Rule to set clear boundaries for what kinds of groups were intended to be included.[103] Hudson Bay stated that "establishing governmentally preferred groups, such as religious organizations or political parties, and providing them with superior access to the public, is in our opinion unquestionably a violation of the Fourteenth Amendment's

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[101] 15 U.S.C. 6106(4) (amended by § 1011(b)(3) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001)).

[102] Proposed Rule § 310.2(f).

[103] NASCO-NPRM at 6.

guarantee of equal protection and of the First Amendment."[104] Similarly, DMA-Nonprofit stated "the Commission has no authority to single out agents of religious organizations for exemption . . . . [T]here is no language in the [USA PATRIOT Act] that allows the Commission to make this distinction." [105]

Based on careful consideration of the record, the Commission is persuaded that no exemptions based upon the type of organization engaged in telemarketing are warranted, and that all telemarketing (as defined in the Telemarketing Act as amended by the USA PATRIOT Act) conducted by any entity within its jurisdiction should be covered by the TSR. This does not mean that the Commission believes political fundraising is within the scope of the Rule.[106] It means only that the TSR applies to all calls that are part of any "plan, program, or campaign" that is conducted by any entity within the FTC's jurisdiction, involving more than one interstate telephone call for the purpose of inducing a purchase of goods or services or a charitable contribution, donation, or gift of money or any other thing of value. Thus, for example, if a for-profit telemarketer on behalf of a (presumably non-profit) political club or constituted religious organization were to engage in a "plan, program, or campaign" involving more than one interstate telephone call

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[104] Hudson Bay-NPRM at 12.

[105] DMA-NonProfit-NPRM at 5-6. *See also* Not-for-Profit Coalition-NPRM at 41.

[106] The USA PATRIOT Act is consistent with a basic common law distinction between charities and political organizations. "Gifts or trusts for political purposes or the attainment of political objectives generally have been regarded as not charitable in nature. Also . . . a trust to promote the success of a political party is not charitable in nature." 15 Am. Jur. 2d *Charities* § 60 (2002). In this regard, it is noteworthy that Congress elsewhere has established a regulatory scheme applicable to political fundraising. 2 U.S.C. § § 431-455.

to induce a purchase of goods or services or a charitable contribution, that activity would be within the scope of the TSR. But if such a for-profit telemarketer on behalf of the same client made calls that were not for the purpose of inducing a purchase of goods or services or a charitable contribution, those calls would not be within the scope of the TSR.

Commenters also addressed the scope of the term "or any thing of value" in the definition of "charitable contribution" in the proposed Rule, suggesting exemptions to limit this definition. Red Cross urged the Commission to exempt blood from the definition of "charitable contribution" because, it argued, "blood donations are not 'a thing of value' in a fiduciary sense." [107] Blood Centers agreed with this position, arguing that while "the donor's blood is of great value to the recipient of the blood donation . . . the donor is not being asked to part with anything other than his or her time." [108] Blood Centers also argued that donations of blood are of grave importance to save lives, and so are distinguishable from typical commercial and even charitable telemarketing calls [109] Another argument raised by Blood Centers in support of its position that a blood donation should be excluded from the definition of "charitable contribution" is that blood donation programs are highly regulated by the Food and Drug Administration ("FDA").[110] March of Dimes also requested that volunteers' time not be considered a "thing of value" under the Rule, noting that their organization often uses the telephone to contact volunteers who then solicit contributions from their friends and neighbors.[111]

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[107] Red Cross-NPRM at 3.

[108] Blood Centers-NPRM at 2.

[109] *Id.*

[110] *Id.* at 2-3.

[111] March of Dimes-NPRM at 2. *See also* AFP-NPRM at 5.

The Commission believes that the text of the USA PATRIOT Act provision expanding the definition of telemarketing to include calls to induce "a charitable contribution, donation, or gift of money or any other thing of value" is broad in scope and plain in meaning. The USA PATRIOT Act specifically uses the term "or any other thing of value" in addition to the terms "charitable contribution, donation, or gift of money," ensuring that it will encompass non-money contributions. The Commission believes that, while blood donors are asked for blood and not money, the blood they donate is clearly a "thing of value." [112] Similarly, although volunteers are asked to give time rather than money, the Commission believes that a donation of time is a "thing of value." [113] Therefore, the Commission cannot exempt from the definition of "charitable contribution" either blood or time volunteered. The Commission believes, however, that legitimate concern about inclusion of blood in the definition should be alleviated by the exemption of charitable solicitation telemarketing from the "do-not-call" registry provisions. The remaining provisions that will apply to telemarketing to solicit blood donations are neither burdensome nor likely to impede the mission of the non-profit organizations that seek such donations.

NAAG and NASCO suggested that the Commission "state that the word 'charitable' does not limit the character of the recipient of the contribution." [114] According to these

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[112] *See* Maryland Health Care, Fall 2000 at 4, http://www.mdhospitals.org/MarylandPubs/ MDHlthCr—1100.pdf (noting the blood shortages had driven up the price of blood from $145.24 per unit to $174.10 per unit in a single year).

[113] Presumably, organizations that rely on volunteers would, absent their donations of time, be forced to pay labor costs associated with the work done by volunteers. Therefore, the time donated is a "thing of value," equivalent to the labor cost saved.

[114] NAAG-NPRM at 52; NASCO-NPRM at 5-6.

commenters, it is important to ensure that donations solicited by or on behalf of public safety organizations are considered "charitable contributions" for regulatory purposes, and that those contributions solicited by sham charities are still "charitable contributions" under the amended Rule.[115] The Commission believes that the current definition, which closely tracks the USA PATRIOT Act definition, is clear as to what is covered.[116] Its focus is on the donation, rather than the solicitor, and it is sufficiently broad in scope to encompass donations solicited on behalf of any organization.

NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves "'percent of purchase' situations, where contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause." [117] These commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule.[118] The Commission believes that when the transaction predom-inantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between

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[115] *Id.*

[116] 15 Am. Jur. 2d *Charities* § 60 (2002).

[117] NAAG-NPRM at 52. *See also* NASCO-NPRM at 5-6.

[118] *Id.*

these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.

§ 310.2(m)—Donor

The proposed Rule contained a definition of "donor" in order to effectuate the goals of the USA PATRIOT Act amendments. Under that definition, a "donor" is "any person solicited to make a charitable contribution." [119] Throughout the proposed Rule, wherever the word "customer" was used, the Commission added the word "or donor" where appropriate, to indicate that the provision was also applicable to the solicitation of charitable contributions. The Commission received very few comments on this definition. The March of Dimes expressed the concern that "[t]he definition of a 'donor' does not accurately reflect the nomenclature used by the industry." [120] Rather, the March of Dimes suggested, the term "donor," as used in philanthropic circles, "connotes an established relationship with the non-profit charitable organization." [121] The March of Dimes recommended replacing the terms "customer" and "donor" in the Rule with the term "consumer."

The Commission believes that the term "consumer" is too broad and non-specific to substitute for the terms "customer" and "donor." [122] The Rule uses these more targeted terms to

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[119] Proposed Rule § 310.2(m), 67 FR at 4540.

[120] March of Dimes-NPRM at 3.

[121] *Id.* (noting that the term "prospect" is used to mean a potential donor).

[122] The term "consumer" is defined generally as "one that utilizes economic goods." Merriam-Webster's Collegiate Dictionary, at: http://www.merriamwebster.com/cgi-bin/dictionary#. This broader term is used in the Rule in the definition of "established business relationship,"

capture the varied nature of transactions between sellers or telemarketers and individuals who are, or may be, required to pay for something as the result of a telemarketing solicitation. Thus, it is the intent of the Commission that the term "donor" as used in the Rule encompass not only those who have agreed to make a charitable contribution, but also any person who is solicited to do so, to be consistent with its use of the term "customer." Therefore, the Commission has determined that the term "donor" is necessary and appro-priate, and has retained the definition of "donor" in the amended Rule without modification.

§ 310.2(n) —Established business relationship

The Commission has determined to add to the Rule a definition of "established business relationship." This new definition comes into play in § 310.4(b)(1)(iii), which now exempts from the national "do-not-call" registry calls from sellers with whom the consumer has an "established business relationship" (unless that consumer has asked to be placed on that seller's company-specific "do-not-call" list). This definition limits the exemption to relationships formed by the consumer's purchase, rental, or lease of goods or services from, or financial transaction with, the seller within eighteen months of the telephone call (or, in the case of inquiries or applications, within three months of the call).

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers.[123] Although the initial comments from consumer

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§ 310.2(n), and in the provision banning the transfer of unencrypted account numbers, § 310.4(a)(5). In each of these instances, the Commission has consciously used the broader term "consumer" to effect broader Rule coverage.

[123] *See, e.g.*, AFSA-NPRM at 13-14; AmEx-NPRM at 3; ANA-NPRM at 5; ARDA-NPRM at 17; ATA-NPRM at 29; BofA-NPRM at 4; Best Buy-NPRM at 1; DialAmerica-NPRM at 12; DMA-NPRM at 33-34; DSA-NPRM at 7-8; ERA-NPRM at 36-37; Gottschalks-NPRM at 1;

groups opposed an exemption for "established business relationships,"[124] their statements during the June 2002 Forum and in their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships.[125] Moreover, state law enforcement representatives' comments on their experience with state "do-not-call"

NCTA-NPRM at 6; NRF-NPRM at 13; PMA-NPRM at 28; Roundtable-NPRM at 5; SIIA-NPRM at 2-3; Time-NPRM at 6-7; VISA-NPRM at 3. *See also, e.g.,* ARDA-Supp. at 1; ICTA-Supp. at 2.

[124] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10. Among other things, consumer advocates opposed such an exemption because of the difficulty in defining a "pre-existing business relationship" without creating significant loopholes in the protections provided by the national "do-not-call" registry (described in the discussion of amended Rule § 310.4(b)(1)(iii) below). *See* NCL-NPRM at 10. Furthermore, they did not agree with industry's argument that consumers want to hear from companies with whom they have an existing relationship. NCL stated that the fact that a consumer may have had a relationship with a company does not necessarily mean that he or she wishes to receive calls, or to continue to receive calls, from that company. NCL-NPRM at 10. Consumer advocates believed the FTC had taken the right approach: the burden should lie with the seller to show specific consent to receive calls. NCL-NPRM at 10; EPIC-NPRM at 20-21; PRC-NPRM at 2.

[125] June 2002 Tr. I at 110 (NCL) ("This would have to be . . . really narrowly defined in order to protect consumers so that if somebody had something that was ongoing . . . that would be in a different category."). *See also* AARP-Supp. at 3 ("AARP recognizes that there may be an expectation by consumers that they will be in contact with businesses with whom they have current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. Therefore, AARP believes that any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party.").

laws that have an exemption for "established business relationships" suggest that this type of exemption is consistent with consumer expectations.[126] While the Commission is persuaded that an "established business relationship" exemption is necessary and appropriate, it believes that the exemption must be narrowly crafted and clearly defined to avoid a potential loophole that could defeat the purpose of the national "do-not-call" registry.

In adopting the "do-not-call" provisions of the original Rule, the Commission considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations.[127] In crafting an "established business relationship" definition, it is useful again to consider the TCPA, which specifically exempts calls "to any person with whom the caller has an established business relationship."[128] The House Report on the TCPA's

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[126] June 2002 Tr. I at 110-19. *See also* June 2002 Tr. I at 119-22, in which participants discussed an AARP survey conducted in conjunction with the Missouri Attorney General's Office, which showed that three-fourths of consumers did not feel an established business relationship was justified. However, representatives from the Missouri Attorney General's Office explained that the results were less a measure of consumer condemnation of such an exemption, than an indication that consumers were receiving calls from businesses with whom they did not perceive that they had such a relationship. According to the Missouri representatives, businesses took a broader view of the relationship than did consumers. As noted in more detail below, consumers appear to be comfortable with an exemption for "established business relationships" once its parameters are explained to them.

[127] 60 FR at 43855.

[128] 47 U.S.C. 227(a)(3)(B). The legislative history of the TCPA shows that Congress exempted "established business relationship" calls "so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship." H.R. REP. NO. 102-317 at 13 (1991). Throughout the House Report discussing the exemption for "established business relationship," the point is stressed that the

"established business relationship" exemption confirms that Congress intended for the reasonable expectation of the consumer to be the touchstone of the exemption:

> In the Committee's view, an "established business relationship" also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call.[129]

When it promulgated its rules pursuant to the TCPA, the FCC included the following definition of "established business relationship" with regard to its company-specific "do-not-call" requirements:

> The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or

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exemption is intended to reach only those relationships that are *current or recent*. The Report consistently refers to an "established business relationship" in terms of "the existence of the relationship *at the time of the solicitation, or within a reasonable time prior to it.*" *Id.* at 13-15. (emphasis added).

[129] *Id.* at 14, 15.

entity, which relationship has not been previously terminated by either party.[130]

Consideration of state approaches to the "established business relationship" exemption is also instructive. Most state "do-not-call" laws have some form of exemption for "established business relationships," and several of these are modeled on the language of the FCC's exemption.[131] However, there is an important difference between the FCC approach and that of many of the states, in that many state law exemptions circumscribe the scope of an "established business relationship" by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.[132] The Commission believes that this approach is more in keeping with consumer expectations than an open-ended exemption. As discussed in more detail below, many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls. A purchase from a seller ten years ago, however, would not likely be a basis for the consumer to expect or welcome solicitation calls from that seller.

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[130] 47 CFR 64.1200(f)(4).

[131] Fourteen state "do-not-call" statutes are open-ended and do not contain a time limit for tolling the established business relationship: Alabama, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Minnesota, Oregon, Texas, Vermont, Wisconsin, and Wyoming. Three of these "open-ended" state statutes incorporate the FCC definition either in whole or in part: California, Texas, and Wyoming. In addition, four other states incorporate the FCC definition in whole or in part, but limit the time period during which a business may claim an "established business relationship" once the relationship has lapsed: Colorado, Kansas, Oklahoma, and Pennsylvania. See note 592 below for citations to all state "do-not-call" statutes.

[132] *See* discussion and note 135 below.

In addition, specific time limits for an "established business relationship" are particularly appropriate for a general "do-not-call" registry such as the one to be maintained by the Commission, as opposed to the company-specific "do-not-call" lists for which the FCC definition was crafted. The Commission believes that an "established business relationship" exemption in a national list applying to many sellers and telemarketers should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers.

Comments received in response to the NPRM stress the importance of extending such an exemption to current, existing relationships and prior relationships that occurred within a reasonable period of time.[133] Throughout the comments from industry stressing the need for an "established business relationship" exemption, a consistent theme is that such an exemption is necessary for "existing customers" or someone with whom sellers "currently do business," and there seems to be a common understanding

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[133] The comments received on "established business relationship" came primarily from the business community. On the other hand, there was little comment from consumer advocates and state regulators on how such an exemption would be formulated because the proposed Rule did not include an "established business relationship" exemption. However, the NPRM did ask about the effect on companies and charitable organizations with whom consumers had a pre-existing business or philanthropic relationship of the proposal to allow companies to call consumers on the "do-not-call" registry if they had given their express verifiable authorization to call (67 FR at 4539, question 9). As discussed in more detail above in note 124, those few consumer advocates who did mention such an exemption were opposed to it.

regarding what constitutes an "existing" relationship.[134] There is less consensus when it comes to the issue of how long a business relationship lasts following a transaction between a seller and consumer. Many states have attempted to provide some clarity regarding how long after dealings between a consumer and seller have ceased that a residual "established business relationship" could be deemed still to exist.

Twelve of the states that have an "established business relationship" exemption limit it to a specific time period after a transaction has occurred, ranging from six months to 36 months.[135] Industry commenters suggested various time periods to limit the exemption. Several suggested 24 to 36 months, while others stated that a shorter period (12 months) would be more appropriate.[136] The Commission believes,

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[134] *See, e.g.*, ABA-NPRM at 10; Community Bankers-NPRM at 2; AmEx-NPRM at 3; ANA-NPRM at 5; Associations-NPRM at 2; ARDA-NPRM at 17; Bank One-NPRM at 4; BofA-NPRM at 4; Best Buy-NPRM at 1; Cendant-NPRM at 5-6; Citigroup-NPRM at 4; Comcast-NPRM at 3; CMC-NPRM at 6; Cox-NPRM at 2, 4; DMA-NPRM at 33, 34; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Gottschalks-NPRM at 1; NCTA-NPRM at 4; NRF-NPRM at 13; SIIA-NPRM at 2-3; Time-NPRM at 6; VISA-NPRM at 3.

[135] Six months (Louisiana, Missouri); 12 months (Pennsylvania, Tennessee); 18 months (Colorado, Illinois); 24 months (Alaska, Massachusetts, Oklahoma); 36 months (Arkansas, Kansas). In addition, New York apparently has adopted an 18-month time period: the New York statute does not contain a time limit; however, at the June 2002 Forum, NYSCPB stated that New York applies an 18-month time limit. June 2002 Tr. I at 115 ("We have two separate exemptions. . . . The second thing is a prior business relationship, which we define as an exchange of goods and services for consideration within the preceding 18 months. . . ."). Indiana's statute does not have an exemption for "established business relationships."

[136] Industry commenters generally supported a 24-month time period, but did not submit data that would tend to show that a shorter time period would not serve their purposes. The breakdown of suggested time periods is as follows: "recently terminated or lapsed" (New Orleans-NPRM at 14-

based on the record evidence and statements from Congress regarding the TCPA's "established business relationship," that a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller sufficient to support the existence of an "established business relationship."

Based on the comments, the Commission finds little support for a 36-month time period. Most of the commenters who suggested that time period did so as part of a joint comment filed by five associations.[137] In the comments the individual associations filed separately, however, they suggested a time period of 24 months.[138] NAA initially suggested 24 months, but expanded that to 36 months in its supplemental comment. Industry commenters who advocate 24 months provide little support for their assertion that it is the appropriate length of time by which to measure "reasonableness;" nor did they submit data that would show that a shorter time period would not serve their purposes. Other industry members (such as Bank of America, Consumer Mortgage Coalition, and Federated Department Stores) suggested shorter time periods. The Commission does not believe that a relationship which terminated or lapsed two years ago would constitute a relationship that had recently terminated or lapsed. The Commission believes that if consumers received a call from a company with whom the

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15); 12 months (BofA-NPRM at 4; CMC-NPRM at 6-7); 24 months (ATA-Supp. at 8; ERA-NPRM at 38; ERA-Supp. at 19; MPA-Supp. at 11; NAA-NPRM at 11; June 2002 Tr. I at 109 (PMA)); 36 months (ARDA-NPRM at 20; Associations-Supp. at 3-4). In a supplement to their comment, FDS supported limiting telemarketing sales calls to customers who have made a purchase in the past 12 months, while allowing strictly informational calls to persons who have had a transaction within the past 36 months. Federated-Supp. at 1-2.

[137] *See* Associations-NPRM at 3-4.

[138] *See* note 136 above.

most recent purchase, rental, lease or financial transaction occurred or lapsed two years ago or longer, consumers would likely be surprised by that call and find it to be unexpected.

The Commission believes that 18 months is an appropriate time frame because it strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when. By extending beyond a single annual sales cycle, the 18-month period allows sufficient time for businesses to renew contact with prospects who may only purchase once a year. Moreover, limiting the "established business relationship" to 18 months from the date of the last purchase or transaction would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers. The experience of states that have an "established business relationship" exemption in their "do-not-call" laws indicates that a relatively limited "established business relationship" exemption does not conflict with consumers' expectations. At the June 2002 Forum, the representatives from New York and Missouri spoke about consumer expectations in connection with their states' "do-not-call" lists.[139] Both noted that consumers appeared to be comfortable with such an exemption because they had received few complaints from consumers regarding companies with whom they had an established relationship.[140]

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[139] *See* June 2002 Tr. I at 110-21.

[140] *Id.* at 118-19 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say they're [sic] prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad.") (Missouri: "Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted,

The states' experience is not contradicted by the comments of individual consumers in response to a specific question included on the Commission's website inviting email comments from the public. Although 60 percent of consumers who responded to this question stated that they opposed an exemption for "established business relationship," 40 percent favored such an exemption.[141]

Furthermore, a study conducted in 2002 by the Information Policy Institute found that consumers preferred a "nuanced approach" to the "do-not-call" issue, wanting to limit some calls to their household, but not all calls.[142] According to the study, 50 percent of consumers surveyed supported regulations that would allow local or community-based organizations to call during specific hours of the day.[143] Furthermore, slightly less than half of the respondents supported legislation that would allow calls, but only from local or community-based organizations with whom they have an existing relationship.[144] The survey showed that consumers were less likely to welcome calls from national companies, although 40 percent indicated that they would

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because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now.").

[141] Analysis of consumer email comments in the Commission's TSR comment database indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1,080 opposed such an exemption. Furthermore, over 13,000 of the 14,971 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a "do-not-call" registry to block other calls.

[142] Michael A. Turner, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices" (Information Policy Institute, June 2002) at 4, 8 (hereinafter "Turner study").

[143] *Id.*

[144] *Id.*

allow calls from national organizations with whom they had an existing relationship.[145]

In sum, consumers are split over whether they favor an "established business relationship" exemption. Given the difference of opinion among consumers, and industry's convincing arguments regarding the detrimental effects the lack of an exemption would cause, the Commission is persuaded to provide an exemption for "established business relationships."

The definition of "established business relationship" in the amended Rule would limit the exemption in the case of inquiries and applications to three months after the date of the application or inquiry (except with the consumer's express consent or permission to continue the relationship). The Commission believes that a consumer's reasonable expectations are different in the case of inquiries and applications as compared to purchase, rental, and lease transactions. A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time. Comments from NYSCPB at the June 2002 Forum also warned of possible abuse in the creation of an "established business relationship" based on inquiries from consumers.[146] The Commission

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[145] *Id.*

[146] [146]: June 2002 Tr. I at 116 (NYSCPB) ("[D]oes a mere inquiry constitute a business relationship? And our answer to that is no, because we have had some what I would say are really sleazy operators. They will call up and leave a message on your phone. They won't even identify who they are. They will simply say 'Call us back, it's very important.' You call back out of curiosity or whatever, okay, and then all of a sudden they feel free to bombard you for the next few years with calls."). The Commission intends that such a practice would not entitle a seller or telemarketer to make calls to consumers by claiming to have an "established business relationship."

believes three months should be a sufficient time frame in which to respond to a consumer's inquiry or application.

The amended Rule allows for an 18-month time limit where there has been a purchase, rental or lease, or other financial transaction between the customer and seller. The 18-month time limit for an "established business relationship" based on a purchase, lease, rental, or financial transaction runs from the date of the last payment or transaction, not from the first payment. In instances where consumers pay in advance for future services (e.g., purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product. For such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front. Sellers who provide products or services where the consumer is required to pay in advance can also get the consumer's express agreement to call, as provided in § 310.4(b)(1)(iii)(B)(i).

Several financial services industry commenters urged that any "established business relationship" exemption should encompass all affiliates of a seller.[147] These commenters noted that regulatory requirements often dictate the corporate structure of financial institutions, which must market products and services across holding company affiliates and subsidiaries.[148] For that reason, they suggested that any exemption for an "established business relationship" should extend to all members of a corporate family, including affiliates and subsidiaries, so long as the individual has an "established business relationship" with any member of that

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[147] *See, e.g.*, BofA-NPRM at 4; Bank One-NPRM at 4; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Fleet-NPRM at 4; VISA-NPRM at 3-4.

[148] *See* Bank One-NPRM at 4; Fleet-NPRM at 4.

corporate family.[149] They also suggested that agents of the seller be included within the exemption if the consumer reasonably would expect the agent to be included under the exception.[150]

The Commission believes that such a broad definition of "established business relationship" is inappropriate in the context of a "do-not-call" registry which is intended to protect consumers' privacy. As stated earlier, the Commission believes that such an exemption must be narrowly crafted to avoid defeating the purpose of the "do-not-call" registry. In determining whether affiliates or subsidiaries should be encompassed within an "established business relationship," the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national "do-not-call" registry?

The Commission used similar reasoning in resolving this issue in connection with the definition of "seller" in the original Rule. In the discussion on the definition of "seller," the Commission stated that there were several factors that it would consider in determining how it would view the Rule's application to diversified companies or divisions within one parent organization. Among those factors was "whether the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole." [151] This distinction looks to consumer expectations and whether a consumer would perceive the division to be the

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[149] *See* Eagle Bank-NPRM at 2; HSBC-NPRM at 2; Roundtable-NPRM at 5.

[150] *See* Roundtable-NPRM at 5.

[151] 60 FR at 43844.

same as or different from other divisions or from the corporate organization as a whole. For example, a consumer who had purchased aluminum siding from Company A's aluminum and vinyl siding subsidiary would likely not be surprised to receive a call from kitchen remodeling service also owned by, and operating under the name of, Company A.

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the "established business relationship" exemption to the national "do-not-call" registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer's expectations of receiving the call are the measure against which the breadth of the exemption must be judged.

§ 310.2(o) —Free-to-pay conversion

Section 310.2(o) of the amended Rule sets out a new definition:—"free-to-pay conversion." In connection with an offer or agreement to sell or provide goods or services, a "free-to-pay conversion" is "a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." The term "free-to-pay conversion" is the terminology commonly used in the telemarketing industry to describe what was referred to throughout the Rule Review proceeding as a "free trial offer."[152]

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[152] *See, e.g.*, Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy—consent.html; Magazine Publishers of America, Resources -Research: "Advance Consent Subscription Plans," http://www.magazine.org/resources/advance—consent.html.

A "free-to-pay conversion" is a form of "negative option feature"—a term that is also newly defined in the amended Rule and is discussed below. The term "free-to-pay conversion" comes into play in the amended Rule in three provisions. First, as a form of negative option feature, any "free-to-pay conversion" is subject to the newly-added disclosure requirements in § 310.3(a)(1)(vii). Second, where a telemarketing offer involves a "free-to-pay conversion," and is accepted by a consumer using a payment method subject to the express verifiable authorization requirements of § 310.3(a)(3), the seller or telemarketer may not use the written confirmation form of authorization generally available under § 310.3(a)(3)(iii). Third, under the new unauthorized billing provision at § 310.4(a)(6), the amended Rule sets forth specific requirements to obtain express informed consent in any transaction involving preacquired account information and a "free-to-pay conversion." Each of these provisions is discussed in detail below.

§ 310.2(q)—Material

The amended Rule retains unchanged the definition of "material" from the original Rule, except for extending it to charitable contributions pursuant to the mandate of the USA PATRIOT Act. The Commission received no comments on this definition in response to the NPRM. The amended Rule has deleted the designations for subsections (a) and (b) that had been proposed in the NPRM. This is merely a formatting change and does not alter the substantive content of the definition. The amended Rule's definition of "material," therefore, reads: "likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution."

§ 310.2(t)—Negative option feature

The amended Rule includes new requirements in § 310.3(a)(1)(vii) for specific material disclosures necessary

to avoid misleading consumers with respect to offers that entail incurring an obligation to pay a seller due to the consumers' non-action. To describe the circumstances when these disclosures must be made, the amended Rule employs the term "negative option feature" and, accordingly, provides a definition of that term in § 310.2(t). A "negative option feature" is any provision under which the consumer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. This provision includes, but is not limited to, "free-to-pay conversions," (which are discussed above), as well as negative option plans [153] and continuity plans.[154] Section 310.3(a)(1)(vii) below provides a detailed

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[153] Under a "negative option plan," the customer agrees to purchase a specific number of items in a specified period of time. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. *See* the Commission's Rule governing "Use of Negative Option Plans by Sellers in Commerce," 16 CFR 425.

[154] A "continuity plan" consists of a subscription to a collection or series of goods. Customers are offered an introductory selection and agree to receive additional selections on a regular basis until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscriptions at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send them. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period. *See, e.g.*, FTC Facts for Consumers, "Continuity Plans: Coming to You Like Clockwork," (June 2002), http://www.ftc.gov/bcp/online/pubs/products/continue.htm. *See also* FTC, "Pre-Notification Negative Option Plans" (May 2001) (distinguishing these plans from continuity plans), http:// www.ftc.gov/bcp/online/pubs/products/negative.htm); and FTC, "Facts for Business:

discussion of the definition of "negative option feature" and the disclosures necessary when such a provision is a part of an offer to sell goods or services.

§ 310.2(u)—Outbound telephone call

Based on a review of the record, the Commission has decided to retain the definition of "outbound telephone call" that was in the original Rule, and not to expand the definition to include "upsell" transactions, as proposed in the NPRM. Many commenters noted that, by including upselling in the proposed Rule's definition of "outbound telephone call," the proposal brought upselling transactions within all of the provisions relating to outbound calls, which led to unintended and undesirable consequences, such as subjecting upsells to the calling time restrictions and national "do-not-call" registry provisions.[155] The amended Rule addresses upselling transactions separately, rather than attempting to sweep them within the definition of "outbound telephone call."[156] The amended Rule reinstates the original definition of "outbound telephone call," with only a modification to reflect the expanded reach of the Rule to charitable contributions pursuant to the USA PATRIOT Act. In the amended Rule, then, an "'[o]utbound telephone call' means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution."

Complying with the Telemarketing Sales Rule," http:// www.ftc. ov/bcp/online/pubs/buspubs/tsr.htm.

[155] *See, e.g.*, ABA-NPRM at 4; AmEx-NPRM at 6; AFSA-NPRM at 16; Associations-NPRM at 3; Cendant-NPRM at 2; CCC-NPRM at 13; Cox-NPRM at 6; KeyCorp-NPRM at 6; Metris-NPRM at 9; MBA-NPRM at 4; NBCECP-NPRM at 2; NCTA-NPRM at 13-14; PCIC-NPRM at 1; PMA-NPRM at 10-11; Time-NPRM at 10; VISA-NPRM at 8; Wells Fargo-NPRM at 5-6.

[156] *See* § 310.2(dd), defining the term "upselling" in the amended Rule.

§ 310.2(w)—Preacquired account information

The amended Rule adds a definition of "preacquired account information" to address the problems that have been associated with telemarketing transactions where the telemarketer already has access to the customer's billing information at the time the outbound call is placed.[157] The NPRM discussed these problems at length. The Commission used the term "preacquired account telemarketing" in the NPRM during its discussion of the proposed ban on disclosing or receiving billing information for use in telemarketing, but did not use the term itself in the proposed Rule, and so did not define it.[158] In response, several industry commenters asked for more specificity as to what the Commission intends the term to mean.[159] Thus, the definition of "preacquired account information" also serves to address these commenters' concerns about clarifying the concept of preacquired account telemarketing.

As explained in detail in the discussion of § 310.4(a)(6) below, the amended Rule sets forth specific requirements for obtaining express informed consent in any telemarketing transaction that involves "preacquired account information." To clarify the situations where these requirements come into play, the amended Rule defines "preacquired account information" as:

> any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the

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[157] *See* discussions of amended Rule § § 310.4(a)(5) and (6) below.

[158] *See* 67 FR at 4512-14.

[159] *See, e.g.*, June 2002 Tr. II at 123-24 (CCC), 133-34 (ERA) and 173 (ATA); PMA-NPRM at 13-14; MPA-Supp. at 5; PRA-NPRM at 13-14.

telemarketing transaction pursuant to which the account will be charged.

The Commission intends this definition to be construed broadly. The definition includes any type of billing information, encrypted or unencrypted,[160] that enables a seller or telemarketer to cause a charge to be placed on any customer's or donor's account without obtaining the account number directly from the customer or donor. It obviously covers instances where the seller or telemarketer is in actual possession of account information, whether by virtue of some prior relationship with the consumer or otherwise. It also is intended specifically to address affinity marketing campaigns where, for example, through a joint marketing arrangement, Seller A provides access to its customer base and those customers' accounts or account numbers to Seller B in exchange for a percentage of the proceeds from each sale.[161]

Some industry members expressed their belief that this second class of transactions does not involve preacquired account information at all because, in such affinity marketing campaigns, Seller B may possess only encrypted account numbers, or no account numbers at all prior to initiating the call to the consumer.[162] The Commission intends to clarify

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[160] By "unencrypted," the Commission means both unencrypted readable account information, and encrypted information in combination with a decryption key. *See* discussion of amended Rule § 310.4(a)(5) below.

[161] *See* 67 FR at 4513.

[162] ERA/PMA-Supp. at 14; June 2002 Tr. II at 134 (ERA). ERA described such a scenario during the June 2002 Forum:

> "What typically might occur is L.L. Bean might enter into some type of [affinity] agreement with Timberland to say, We would like you to sell your boots . . . to our customers. . . . So L.L. Bean would provide the name and telephone number . . . and they might provide some unique identifier, it could be a four digit code. It might be an encrypted code that's used solely for the purpose of matching back,

that such an arrangement does involve "preacquired account information," since the seller or telemarketer does not have to obtain the account number from the customer or donor in order to cause a charge to be placed on the customer's or donor's account.

Finally, this definition would apply to upsell transactions, because the seller or telemarketer in the upsell transaction may either already possess the account information from the initial transaction, or would, by virtue of a joint marketing or other arrangement, have access to that information, so as to be able to charge the customer without getting the account number directly from the customer in the upsell transaction.

§ 310.2 (cc) —Telemarketing

The Commission received very few comments on its proposed definition of "telemarketing," [163] but those it did receive expressed agreement that the definition should continue to include the phrase "by use of one or more telephones," to ensure that large and small telemarketing

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but the account billing number or any information that would provide access to the account is not transmitted to the telemarketer when you make that call. They make the call to the consumer. They ask the consumer if they want to order the boots. If the customer says yes, that information is then transferred to Timberland. Timberland would go back to L.L. Bean and say, This customer has accepted our offer. We would now like to get the account information to bill the consumer for something that they've authorized."

June 2002 Tr. II at 136-37.

[163] Although few commenters directly addressed this definition, many who commented on the USA PATRIOT Act amendments discussed the expansion of the Rule to cover the solicitation of charitable contributions. These comments are addressed above, in the discussion of amended Rule § 310.1 relating to the scope of the Rule.

operations are covered by the Rule.[164] Based on the Commission's review of the record in this proceeding, the amended Rule retains unchanged the definition of "telemarketing" that was proposed in the NPRM. This definition is virtually the same as that in the original Rule, except that it now includes the phrase "or a charitable contribution" following "goods or services," pursuant to the mandate of the USA PATRIOT Act.

§ 310.2(dd) —Upselling

As described above in § 310.2(u), the Commission proposed in the NPRM to modify the Rule's definition of "outbound telephone call" to include most upsell transactions.[165] The majority of commenters who addressed this issue, including both industry members and consumer groups, supported the proposition that upsells should be expressly included in the Rule.[166] Most of these commenters, however,

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[164] DOJ-NPRM at 1 (noting its experience with fraudulent telemarketers operating using only one or two telephones); Patrick-NPRM at 2 (urging that the practice of subcontracting telemarketing to individual sales agents who work from their homes using their home phones continue to be captured by the Rule).

[165] Specifically, the Commission proposed amending the definition to mean "any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization." Proposed Rule § 310.2(t), 67 FR at 4541.

[166] *See, e.g.*, AmEx-NPRM at 6 ("We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product."); ERA-NPRM at 8, 11 ("The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. . . . The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and

suggested that the Commission's proposal to address the problem by expanding the definition of "outbound telephone call" to include upselling was not the most effective way to achieve this goal.[167] Instead, many commenters recommended treating upsells as a distinct type of transaction by adding a definition of "upselling" to the Rule and specifying a unique set of disclosures required in upsell transactions.[168] Others suggested retaining the expanded definition of "outbound telephone call" but amending it to avoid application of certain provisions unnecessary or inappropriate to the upselling context,[169] such as application of the "do-not-call" and calling time provisions of the Rule, to upsells.[170] The Commission

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supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure. . . ."); ERA-Supp. at 6; LSAP-NPRM at 6; NAAG-NPRM at 36; NCL-NPRM at 3; PMA-NPRM at 4, 8 ("PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel."); June 2002 Tr. II at 213-15, 249-50. But see CCC-NPRM at 15-16; CMC-NPRM at 7; Household Auto-NPRM at 3; Keycorp-NPRM at 5-6; Noble-NPRM at 3; NATN-NPRM at 3-4; NSDI-NPRM at 4; PCIC-NPRM at 1-2; Technion-NPRM at 5.

[167] AmEx-NPRM at 6; ARDA-NPRM at 4; DMA-NPRM at 38; ERA-NPRM at 8, 12; Household Auto-NPRM at 3; ICT-NPRM at 2; E-Commerce Coalition-NPRM at 2; NCTA-NPRM at 14; PMA-NPRM at 8-10; SIIA-NPRM at 3; Time-NPRM at 9; June 2002 Tr. II at 213-14.

[168] *See, e.g.*, ERA-NPRM at 14-15; ERA-Supp. at 6; PMA-NPRM at 8-10.

[169] ARDA-NPRM at 4; Cox-NPRM at 36; Discover-NPRM at 5; Eagle Bank-NPRM AT 4; NCL-NPRM at 3.

[170] ABA-NPRM at 4-5; AFSA-NPRM at 15; ARDA-NPRM at 4; CCC-NPRM at 13; DMA-NPRM at 38; Eagle Bank-NPRM at 4; NCTA-NPRM at 14; PMA-NPRM at 10; SIIA-NPRM at 3; Time-NPRM at 10. The "do-not-call" provision is found at proposed and amended Rules § 310.4(b)(1)(iii), while the calling time restrictions are at proposed and amended Rules § 310.4(c).

does not intend for upselling to be subject to the "do-not-call" requirements or the calling time restrictions in the Rule.[171] The goal of the initial proposal,[172] and the focus of the current amendments, is to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.

Based upon the comments received during the rulemaking period and the Commission's law enforcement experience, the Commission has taken a two-fold approach to upselling in the amended Rule. The Commission has added a definition of "upselling," which, in combination with certain amendments to § § 310.4(d) and 310.6 of the Rule,[173] provides important protections to consumers who, after completing one transaction, are offered goods or services in an additional telemarketing transaction during the same telephone call.[174] By including the definition, the Commission intends to clarify that upsells are subject to all of the Rule's requirements

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[171] June 2002 Tr. II at 213-15.

[172] *See* 67 FR at 4500.

[173] Section 310.4(d) now includes the phrase "or internal or external upsell" after "outbound telephone call" to clearly state that the basic disclosure requirements of that provision—the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and disclosures related to prize promotions—must be made in any upsell associated with an initial telephone transaction. Sections 310.6(b)(4), (5) and (6) have been amended to expressly exclude upsells from these exemptions.

[174] The provisions relating to "upselling" address the practices which the Commission had proposed to address in the NPRM through modification of the definition of "outbound telephone call." Because the amended Rule addresses the practice of "upselling" in a different manner, the amended Rule retains unchanged the wording in the original Rule for the definition of "outbound telephone call" (now expanded to cover calls to induce charitable contributions, pursuant to the USA PATRIOT Act). *See* § 310.2(u) of the amended Rule.

except the "do-not-call" and calling time restrictions in §§ 310.4(b)(1)(iii) and 310.4(c).[175] With this definitional shift, the "do-not-call" regime no longer applies to upsells, since the "do-not-call" provisions specifically prohibit "initiating outbound telephone calls" to anyone who has placed their telephone numbers on a company-specific "do-not-call" list or on the FTC's "do-not-call" registry.[176] Second, the amended Rule expressly excludes upsell transactions from the exemptions in §§ 310.6(b)(4), (5) and (6)—i.e., where the initial transaction is exempted from the Rule because the call was initiated by the consumer unilaterally or because it was initiated in response to a direct mail solicitation or general media advertisement.[177]

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[175] In the NPRM, the Commission noted that in addition to the disclosure requirements of § 310.4(d) (and the proposed disclosures of § 310.4(e)), the disclosures in § 310.3(a)(1):

> "would, of course, also have to be made by each telemarketer. In fact . . . the Commission believes that [in any upsell] it is necessary for this transaction to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule's requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that the consumer's or donor's explicit consent to the purchase or contribution is obtained."

67 FR at 4500, n.71.

[176] *See* § 310.4(b)(1)(iii).

[177] Treating upsells as "outbound telephone calls" meant that they were implicitly not covered by any of these exemptions (which all involve inbound telephone calls of one sort or another). Creating a separate definition for "upselling" requires that the Commission explicitly address which of the exemptions in § 310.6 of the Rule do not apply to upselling.

The definition of "upselling" encompasses any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call. Thus, both solicitations made by or on behalf of the same seller involved in the initial transaction, and those made by or on behalf of a different seller are considered upsells, and both types of transactions are covered by the Rule.[178] The term "initial transaction" is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to sales offers, customer service calls initiated by either the seller or telemarketer or the consumer, consumer inquiries, or responses to general media advertisements or direct mail solicitations. The upsell is defined as a "separate telemarketing transaction, not a continuation of the initial transaction" to emphasize that an upsell is to be treated as a new telemarketing call, independently requiring adherence to all relevant provisions of the Rule.[179]

Upselling occurs in a wide variety of circumstances—as an addendum to a customer service call, or after an initial offer of goods or services via an inbound or outbound telephone

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[178] In the NPRM, the Commission focused its analysis of upselling on whether there were one or two telemarketers or sellers involved in the upsell transaction. After reviewing the record in this matter, the Commission believes that the salient distinction is whether a separate offer is made in the course of a single telephone call.

[179] This definition also addresses the concerns of some telemarketers that simply transferring a consumer-initiated call to the individual most qualified to address the consumer's inquiry would trigger the application of the Rule to that otherwise exempt transaction. *See, e.g.*, CMC-NPRM at 7-8; Cox-NPRM at 35; Eagle Bank-NPRM at 4; HSBC-NPRM at 2. Instead of focusing on the transfer of a call, the definition of "upselling" centers on the instigation of an offer for sale of goods or services subsequent to an initial transaction. Thus, where a consumer calls a company, makes an inquiry, and is *immediately* transferred in direct response to that inquiry, that transfer would not fall within the definition of "upselling" and would not be subject to the Rule.

call, for example.[180] The upsell can be made by or on behalf of the same seller involved in the initial transaction ("internal upsell"), or a different seller ("external upsell").[181] Commenters argue that upsell transactions provide benefits to both sellers and consumers. According to some industry commenters, sellers can reduce costs associated with telemarketing by linking transactions together in a single call,[182] and are more likely to make successful sales to consumers already predisposed to the transaction.[183] Consumers can

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[180] *See, e.g.*, NAAG-NPRM at 33 ("The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair. . . . Some examples are the upsell of membership programs, magazines and the like or a television solicitation to buy an inexpensive lighting product that includes an upsell of a costly membership program, consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy, or tickets to entertainment events.") (citations omitted). Industry commenters emphasized the prevalence of upselling in the inbound call context generally. *See, e.g.*, CCC-NPRM at 12; ERA-NPRM at 11-12; PMA-NPRM at 9-10

[181] The NPRM described these forms of upselling as "internal" and "external." 67 FR at 4496. Some commenters, such as ERA, noted that the industry refers to multiple offers by a single seller—what the Commission calls an "internal upsell"—as a "cross sell," and to multiple offers by separate sellers—what the Commission calls an "external upsell"—as an "upsell." ERA-NPRM at 9, n.3. The Commission's approach, however, does not appear to have caused any confusion in the industry, or on the consumer side. So, for the sake of consistency both within the rulemaking process and with existing law enforcement cases, the Commission has decided to retain these terms as originally proposed.

[182] *See, e.g.*, PMA-NPRM at 9.

[183] CCC determined that 14 billion inbound calls are made per year, of which 40 percent have an upsell associated with them. June 2002 Tr. II at 218. ERA estimated, based on a 12 percent conversion rate, that approximately $1.5 billion in sales are generated through inbound upsells alone each year. ERA-NPRM at 11. Aegis estimated the conversion rate for consumers accepting upsell offers at between 25 and 30 percent. Aegis-NPRM at 4.

benefit from the convenience of such transactions, and from receiving more targeted marketing offers.[184] Industry commen-ters also suggested that sellers' reduced costs in such transactions are passed along as savings to consumers.[185]

Despite these benefits, upsells are no less vulnerable to abuse than other telemarketing practices, and provide the potential for harm to consumers. Some industry commenters argued that this is not the case, suggesting that, particularly when the call is initiated by the consumer: "The consumer calling a business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business . . . ." [186]

According to NCL, however, "[c]omplaints to the NFIC [National Fraud Information Center] indicate that abuses can occur when consumers who respond to an advertisement for one thing are then solicited for something else, especially if the new offer is significantly different than the original one or is from another vendor. In these situations, the only information that consumers have on which to decide whether to make a purchase or donation is that which is provided during the call." [187] In other words, in any upsell, the seller or telemarketer initiates the offer; it is not the consumer who solicits or requests the transaction. This means that the

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[184] DMA-NPRM at 40; PMA-NPRM at 10; SIIA-NPRM at 3.

[185] ERA-NPRM at 12; PMA-NPRM at 10; SIIA-NPRM at 3.

[186] CMC-NPRM at 9. *See also* Citigroup-NPRM at 6-7; Fleet-NPRM at 5; Household Auto-NPRM at 4.

[187] NCL-NPRM at 3. *Accord* ERA-NPRM at 11 ("The ERA is . . . aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique.").

consumer is hearing the terms of that upsell offer for the first time over the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase. This makes an upsell very much akin to an outbound telephone call from the consumer's perspective, even when the seller is someone with whom the consumer is familiar. Thus, as NCL noted, every consumer needs "the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions [of the offer]" regardless of the nature of the telephone sale.[188] The disclosure provisions of §§ 310.3(a) and 310.4(d) were designed to ensure that consumers know they are being offered goods or services for sale, and receive all information material to their decision to accept an offer before they pay for the purchase.

Moreover, it should be noted that the introductory paragraphs of § § 310.3(a), 310.4(a) and 310.5 do not distinguish between types of telemarketing transactions.[189] The Rule is clear that its requirements and prohibitions apply to *all sellers and telemarketers* that are subject to the Commission's jurisdiction. Thus, a seller or telemarketer subject to the Rule must abide by the requirements of these sections, regardless of whether they are engaged in an initial telemarketing

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[188] June 2002 Tr. II at 221-22.

[189] Section 310.3(a) states "it is a deceptive telemarketing act or practice and a violation of this Rule *for any seller or telemarketer to engage in the following conduct.*" (emphasis added). Similarly, § 310.4(a) states "it is an abusive telemarketing act or practice and a violation of this Rule *for any seller or telemarketer to engage in the following conduct.*" (emphasis added). Section 310.5(a) states "any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities."

transaction or in an upsell transaction. Indeed, the Commission assumes that, where the initial transaction is subject to the Rule, most sellers and telemarketers treat the upsell as subject to the Rule as well, and comply with the Rule's requirements in both segments of the telephone call.[190]

The Commission also finds that consumers should have the Rule's billing protections in each of these transactions. CCC suggested that, at least in inbound calls that include upsells, consumers have "the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before." [191] However, the Commission's and states' law enforcement experience does not support CCC's assertion that, by giving consent to the use of an account

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[190] The record suggests, however, that the opposite is true when upsells are appended to calls that are otherwise exempt from the Rule. In these instances, the upsells have been treated as part of the exempt telemarketing transaction and, thus, consumers are not receiving the protections the Rule requires when a consumer receives an outbound telephone call, despite the fact that upsells are similar to outbound calls from the consumer's perspective. *See, e.g.*, PCIC-NPRM at 1-2. The Commission believes that the protections provided a consumer in an upsell should be the same as the protections accorded to consumers receiving an outbound telephone call, regardless of whether the upsell is appended to an exempt telemarketing transaction or to a transaction subject to the Rule. As noted above, consumer advocates and the FTC's law enforcement experience confirm that upselling can be equally or more problematic, and thus sellers and telemarketers engaged in upselling should be required to provide the basic disclosures mandated by the Rule. In addition, there is no evidence to suggest that upsells should not be subject to any other part of the Rule (other than the "do-not-call" and calling time restrictions).

[191] CCC-NPRM at 12.

number in an initial transaction, the consumer in an upsell is afforded protection from deception or unauthorized billing.[192]

Other recommendations

Limitations to the definition of "upselling." Some commenters suggested that the definition of "upselling" be limited to "external upselling" transactions (i.e., where there are two different sellers in the two transactions).[193] They argued that any requirements that the Commission might apply to "upselling" should not include upsells made by or on behalf of the same seller.[194] However, the Commission believes that law enforcement experience indicates that "internal upsells" (where both transactions are by or on behalf of the same seller) have as much potential for deception and abuse as other types of telemarketing transactions that are subject to

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[192] Indeed, law enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information [in an initial transaction may actually result in greater risk of abuse during the second transaction. For example, in actions by the FTC and several states against Triad Discount Buying Service, Inc., and related entities, the Commission and the states alleged that the defendants crafted a marketing campaign designed to lure consumers to call solely for the purpose of upselling them. *See FTC v. Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). Specifically, the Commission and states alleged that the defendants ran an advertising campaign for a free product, inviting consumers to call a toll-free number. When they called, consumers were asked to provide account information to pay for shipping and handling for the free product, and then were upsold a "free trial" in a membership club or buyers club, that was then charged, without the consumer's knowledge or consent, to the account provided by the consumer to pay for the shipping of the first product. *See also* NAAG-NPRM at 30, n.73 (citing, among others such cases, *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592) and *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance)).

[193] ERA-NPRM at 9; NCTA-NPRM at 14.

[194] *Id.*

the Rule's requirements.[195] Therefore, the Commission has not adopted this suggestion.

Other commenters argued that the definition of "upselling" should not include upsells by "affiliates." [196] Still others made more specific requests to exempt banks, their affiliates and non-affiliated third parties who provide services on the banks' behalf or with whom the banks have joint marketing relationships; [197] to exempt agents or affiliates of common carriers; [198] and to exempt affiliates of insurance companies.[199] However, once again, there is scant support justifying such an approach. On the contrary, the record as a whole and law enforcement experience indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.[200]

The Commission has made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. However,

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[195] *See* NAAG-NPRM at 30, n.73, citing cases involving internal upsells, including but not limited to *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *Triad Discount Buying Serv., Inc.* [a/k/a *Smolev*] and related entities; and *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001).

[196] ABIA-NPRM at 5; AFSA-NPRM at 15; NFC-NPRM at 6.

[197] ABIA-NPRM at 5; MBA-NPRM at 3.

[198] SBC-NPRM at 2, 5, 8.

[199] PCIC-NPRM at 1-2.

[200] *See* NAAG-NPRM at 30, n.73 ("States have taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *See* note 188. See *also New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance)").

the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities. As the Commission stated in the SBP for the original Rule:

> The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.[201]

Clarification of "seller" in an upsell transaction. ERA and PMA recommended that the Commission clarify what is meant by "seller" in the context of upselling.[202] First, ERA and PMA suggested that "seller" be construed as the marketer who will submit the charge for payment against the consumer's account.[203] As ERA stated:

> [A] marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even take possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably 'sellers.' However, only the marketer will bill the consumer for the sale. As such, there should be

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[201] 60 FR at 43843.

[202] ERA-NPRM at 9-10; PMA-NPRM at 12-13. *See also* VISA-NPRM at 9 (requesting clarification of the term in all transactions, not just those involving upselling).

[203] ERA-NPRM at 10; PMA-NPRM at 13.

no need to identify both entities to the consumer. In fact it would likely be confusing to the consumer to do so.[204]

The Commission has retained in the amended Rule the definition of "seller," which states that a "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."[205] The Commission believes that this definition makes clear that, for purposes of the Rule, a "seller" is not necessarily the manufacturer of a product, nor the sole financial beneficiary from its sale. Rather, the definition of "seller" is predicated upon a person's provision of goods or services—whether consummated, merely offered, or even simply "arranged for"—to the customer. Therefore, in the case of an upselling transaction, or, indeed, any telemarketing transaction, the marketer or other entity who provides, offers to provide, or arranges for the provision of the goods or services that are the subject of the offer would be the "seller" for purposes of the Rule.

Second, both ERA and PMA, as well as a number of other commenters, suggested that the Commission "clarify that affiliated entities do not constitute separate sellers."[206] To this end, ERA recommended looking to the Commission's Privacy of Consumer Financial Information Rule,[207] while PMA and NRF suggested using the standard laid out by the

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[204] ERA-NPRM at 11.

[205] Amended Rule § 310.2(z).

[206] ERA-NPRM at 10. *See also* June 2002 Tr. II at 222 (ATA); PMA-NPRM at 13; SBC-NPRM at 9.

[207] The Privacy of Consumer Financial Information Rule, 16 CFR 313.3(a), defines an affiliate as "any company that controls, is controlled by or is under common control with another company." (quoted in ERA-NPRM at 11).

FCC for "do-not-call" purposes.[208] NCL and AARP disagreed. NCL stated:

> We believe affiliates have to be treated as second sellers. They may be selling totally different products with different terms and conditions. Consumers don't have any way of knowing what is an affiliate of that company and what isn't, and ultimately it doesn't really matter to them because they need the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions, whether it's entirely a different seller or an affiliate of the original one.[209]

The Commission shares this viewpoint. As discussed above, the record in this matter, as well as law enforcement experience, indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements. For that reason, the Commission believes that affiliates should be treated as separate sellers for purposes of upsell transactions.

C. Section 310.3—Deceptive Telemarketing Acts or Practices.

Section 310.3 of the original Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to

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[208] The applicable definition in the FCC's regulations is found at 47 CFR 64.1200(e)(2)(v). PMA-NPRM at 13 ("Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller."). *See also* June 2002 Tr. II at 217-18; and at 226-28 (NRF).

[209] June 2002 Tr. II at 221-22; and at 228 (AARP).

induce the purchase of goods or services; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.

In the NPRM, the Commission proposed amendments to require that disclosures made pursuant to this section be made "truthfully;" require additional disclosures regarding prize promotions and in the sale of credit card loss protection plans; prohibit misrepresentations in the sale of credit card loss protection plans; expand the reach of the express verifiable authorization provision to include all methods of payment lacking certain key consumer protections; and make certain changes pursuant to the USA PATRIOT Act, which extends the coverage of the Rule to include the inducement of a charitable solicitation.

Based on the record in this proceeding, the Commission has determined to make additional modifications in the amended Rule. These changes, and the reasoning supporting the Commission's decisions, are set forth below.

§ 310.3(a)(1) —Required disclosures

Section 310.3(a)(1) of the original Rule requires the seller or telemarketer to disclose, in a clear and conspicuous manner, certain material information before a customer pays for goods or services offered.[210] The NPRM proposed to make a minor modification to the wording, by adding the word "truthfully" to clarify that it is not enough that the disclosures be made; the disclosures must also be true. The Commission received no comment on this proposed change, and therefore has determined to retain this additional wording in amended § 310.3(a)(1).

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[210] *See* ARDA-NPRM at 5 (noting that ARDA members support the current disclosures required by this section).

The few comments that the Commission received on § 310.3(a)(1) in response to the NPRM focused primarily on the timing of the required disclosures. AARP argued that, to be meaningful, the disclosures required by this section must be given before payment is requested, not merely before it is "collected."[211] According to AARP, "[s]uch infor-mation is key to making truly informed buying decisions," and so all the necessary disclosures should be given before a consumer is requested to pay for goods and services.[212] DOJ commented that the use of money-transmission services, rather than couriers, is increasingly popular in fraudulent telemarketing schemes, and recommended that the Commission amend the current footnote addressing the meaning of "before the customer pays" to state: "Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment."[213]

In the SBP for the original Rule, the Commission noted that for a telemarketer to make the required disclosures "before a customer pays," the disclosures must be made "before the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information."[214] In the original Rule's TSR Compliance Guide, the Commission further clarified that the disclosures required by § 310.3(a)(1) must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial

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[211] AARP-NPRM at 8.

[212] *Id.*

[213] DOJ-NPRM at 2.

[214] 60 FR at 4384.

payment. . . ." [215] The Guide goes on to say that "[a] seller or telemarketer also must provide the required information before requesting any credit card, bank account, or other information that a seller or telemarketer will or could use to obtain payment." [216] The Commission believes that its statements to date on the meaning of the term "before the customer pays" are sufficiently clear and declines to modify this provision.

§ 310.3(a)(1)(i) —Disclosure of total costs

Section 310.3(a)(1)(i) of the original Rule requires a seller or telemarketer to disclose the total costs to purchase, receive, or use the goods or services. As noted in the TSR Compliance Guide, "[i]t is sufficient to disclose the total number of installment payments, and the amount of each payment, to satisfy this requirement." [217] Some commenters in the Rule Review urged the Commission to require, in sales involving monthly installment payments, the disclosure of the total cost of the entire contract, not just the amount of the periodic installment.[218] In the NPRM, the Commission declined to modify the provision, but clarified that "the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly." [219] The NPRM further noted that the best practice to ensure compliance with the clear and conspicuous standard governing all the § 310.3(a)(1) dis-

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[215] TSR Compliance Guide at 11.

[216] *Id.*

[217] *Id.* at 12.

[218] *See* 67 FR at 4502.

[219] *Id.*

closures is to "do the math" for the consumer, stating the total cost of the contract whenever possible.[220] The Commis-sion acknowledged that such a statement might not be possible in an open-ended installment contract, and stated that in such contracts, "particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand."[221]

In response to the NPRM, the Commission again received some comments urging that the Commission affirmatively mandate that, in installment sales contracts, the total cost of the contract be disclosed, rather than the number and amount of payments.[222] For example, LSAP opined that "it is illogical to maintain a provision that demands a subjective determine-ation of whether or not a disclosure meets a 'clear and conspicuous' standard when an objective and unambiguous standard can be adopted."[223] NACAA suggested that the Commission require disclosure of the total cost of the contract, noting that consumers do not always have the time or ability to "do the math" during a telemarketing call.[224] NCL concurred with LSAP and NACAA, and noted that since the seller or telemarketer would know the total contract price in an installment offer, it would impose no undue burden on industry members to mandate disclosure of the total contract price.[225]

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[220] *Id.*

[221] *Id.* at n.92.

[222] *See, e.g.*, LSAP-NPRM at 6-8; NACAA-NPRM at 7-8; NCL-NPRM at 3-4; NCLC-NPRM at 13.

[223] LSAP-NPRM at 7.

[224] NACAA-NPRM at 7-8 (citing, as an example of the harm that would persist absent such a provision, the sale of purportedly "free" magazines, for which consumers are billed exorbitant "shipping and handling" fees).

[225] NCL-NPRM at 3-4.

The Commission declines to adopt the recommendations to modify the total cost disclosure provision. The Commission believes that its interpretation, set forth in the NPRM, allows sellers and telemarketers the flexibility necessary to make a truthful and meaningful disclosure when goods or services are offered in conjunction with an open-ended installment agreement. The Commission's interpretation makes clear, however, that, at a minimum, the total number of payments and the amount of each must be clearly and conspicuously disclosed in order to satisfy the requirements of § 310.3(a)(1)(i). Although the Commission continues to believe that the best practice is for the telemarketer or seller to disclose the full amount of payments under of the contract whenever possible, it declines to impose such a requirement, which would be unworkable in the context of open-ended contracts, such as negative option plans.[226]

The Commission also declines to adopt the recommendation that the Commission explicitly state that for electricity sales, it is permissible to disclose the price per kilowatt hour.[227] The Commission recognizes that a vast number of goods and services can be sold through telemarketing, and believes it unnecessary to specify, for each, the specific terms that must be disclosed. Rather, the Commission believes that the language of § 310.3(a)(1)(i), which requires that the disclosure of total costs (among others) be made "truthfully, and in a clear and conspicuous manner," provides sufficient guidance for sellers who must make these disclosures, without necessitating explicit approval from the Commission for each of the myriad variations of "total cost" disclosures for the many kinds of goods and services sold through telemarketing. Therefore, § 310.3(a)(1)(i) is retained unchanged in the amended Rule.

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[226] *See* 60 FR at 43846 (noting that the total cost of a contract cannot be ascertained in negative option or continuity plans).

[227] *See* Green Mountain-NPRM at 7.

§ 310.3(a)(1)(ii) —Disclosure of material restrictions

Section 310.3(a)(1)(ii) requires the disclosure of "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer." In response to the Rule Review, NAAG recommended that this provision explicitly state that the illegality of the goods or services offered is a material term. NAAG's concern arose out of the numerous cross-border foreign lottery scams in which U.S. citizens are offered the sale of foreign lottery chances.[228] The Commission declined to modify the Rule, stating its position that the term "material" is "sufficiently clear and broad enough to encompass the illegality of goods or services offered."[229]

In response to the NFRM, DOJ supported NAAG's reasoning, and recommended that the Commission add to § 310.3(a)(1)(ii) "a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering," noting that such an amendment would enhance law enforcement and consumer education efforts regarding foreign lottery scams.[230] The Commission remains confident that the breadth of the term "material," as used in the Rule, would necessarily encompass the underlying illegality of goods or services offered in telemarketing.[231] Therefore, the Commission declines to modify the language in this provision and the amended Rule retains unchanged the original text of § 310.3(a)(1)(ii).

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[228] 67 FR at 4502-03.

[229] *Id.* at 4503.

[230] DOJ-NPRM at 3.

[231] As the Commission noted in the NPRM, the definition of "material" under the Rule comports with the Commission's Deception Statement and established Commission precedent. *See* 67 FR at 4503.

§ 310.3(a)(1)(iv) —Disclosures regarding prize promotions

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose, before a customer pays, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no-purchase/no-payment method of participating in the prize promotion. In the NPRM, the Commission proposed adding a disclosure that making a purchase will not improve a customer's chances of winning,[232] which would make the TSR's disclosure provision consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act of 1999 ("DMPEA").[233] After reviewing the record in this matter, the Commission has determined to amend the Rule by adding this disclosure requirement to two provisions: in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).[234]

As noted in the NPRM, the Commission believes that this disclosure will prevent consumer deception. The legislative

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[232] 67 FR at 4503. Although NCL originally made this suggestion with respect to § 310.4(d), which governs oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See NCL-RR at 9. *See also* the discussion below in the section on sweepstakes disclosures within the analysis of § 310.4(d).

[233] 67 FR at 4503. The DMPEA is codified at 39 U.S.C. 3001(k)(3)(A)(II). *See also* "The DMA Guidelines for Ethical Business Practice," revised Aug. 1999, at http://www.the-dma.org/library/guidelines/dotherightthing.shtml#23 (Article #23, Chances of Winning). In this regard, it is noteworthy that the DMA's Code of Ethics advises that "[n]o sweepstakes promotion, or any of its parts, should represent . . . that any entry stands a greater chance of winning a prize than any other entry when this is not the case."

[234] *See* discussion below regarding the disclosure in § 310.4(d).

history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a purchase will enhance their chances of winning the touted prize.[235] Such a message is likely to influence these consumers' purchasing decisions, inducing them to purchase a product or service they otherwise would not purchase just so they can increase their chances of winning. For this reason, the Commission believes that entities using these promotions must disclose that a purchase will not enhance the chance of winning, to ensure that consumers are not deceived.

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[235] *See* SEN. REP. NO. 106-102 (1999); and H. REP. NO. 106-431 (1999). Law enforcement actions since enactment of DMPEA further support this conclusion. For example, Publishers Clearing House ("PCH") agreed to settle an action brought by 24 states and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the consumer's chances of winning, and pay $18.4 million in redress. In 2001, PCH agreed to pay $34 million in a settlement with the remaining 26 states. *See, e.g., Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Ct., No. 99 CC 084409 (2002); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Ct. of Common Pleas, No. 00CVH-01-635 (2001). Similarly, in 1999, American Family Publishers ("AFP") settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 states, was settled in March 1998 for $1.5 million, but was reopened and expanded to 48 states and the District of Columbia after claims that AFP had violated its agreement. The state action was finally settled in August 2000 with AFP agreeing to pay an additional $8.1 million in [damages. *See, e.g., Washington v. Am. Family Publishers*, King County Super. Ct., No. 99-09354-2 SEA (2000).

Commenters who addressed this proposal generally were supportive of adding the disclosure.[236] NAAG supported the additional disclosure, but asked the Commission to go further. First, NAAG suggested that any telemarketer using a prize promotion should be required to disclose the actual or estimated odds—not simply how the odds might be calculated.[237] Second, NAAG recommended that the original Rule's definition of "prize"[238] be made consistent with state laws and regulations, and the several multi-state settlements with large promotional sweepstakes companies.[239] Third, they recommended that the Commission track provisions in the recent settlements between the states and PCH, which would ensure that the means by which a consumer might enter a sweepstakes without making a purchase is not more difficult than if a purchase were made.[240] Each of these suggestions is discussed below.

As noted in the SBP for the original Rule, the Commission continues to believe that, in many instances, actual odds cannot be calculated in advance. In such circumstances, the Commission believes that requiring prize promoters to

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[236] ARDA-NPRM at 5; NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4; DOJ-NPRM at 3-4. *See also* June 2002 Tr. II at 105-15.

[237] NAAG-NPRM at 54. NACAA also recommended that the Commission require more specificity in the disclosure regarding the odds. NACAA-NPRM at 6-7; and discussion regarding the disclosure of odds, June 2002 Tr. II at 113-15. DOJ recommended that the Commission include a brief explanation in the Rule or in a footnote of what is meant by the phrase "the odds of being able to receive a prize," and clarify that the disclosure must give the odds for each prize. DOJ-NPRM at 3-4.

[238] Original Rule § 310.2(v).

[239] NAAG-NPRM at 54. NAAG recommended that "prize" be defined to be an item of value and that it not be an item that substantially all entrants in the promotion will receive.

[240] *Id.* at 54-55.

disclose "estimated" odds has greater potential for abuse than a disclosure of the method used to calculate those odds.[241] Furthermore, in many instances, such a requirement to disclose odds would reveal that virtually every entrant gets a "prize." The Commission believes that the better course is to require prize promoters to disclose the method by which odds are calculated. With regard to the suggestions to revise the definition of "prize" and the ease of entry for non-purchasers, the record provides no evidence on why the difference between a "prize" and a "free gift" would be material to consumers. The Commission believes that its authority to reach deceptive or unfair acts or practices under the FTC Act has been sufficient to address any deceptive prize promotions that have not been reachable under the Rule.[242] The Commission's requirements regarding prize promotion disclosures are not inconsistent and do not conflict with the more restrictive state laws. Therefore, the Commission declines to adopt NAAG's recommendations.

PMA maintained that the disclosure that making a purchase would not improve a customer's chances of winning was unnecessary and that there was no evidence on the record to support its addition to the Rule.[243] They suggested that the disclosure makes sense in the context of direct mail, but not in the types of representations more often found in

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[241] Ironically, requiring accurate disclosure of the odds of winning also is likely to subject some sellers and telemarketers to liability under the Rule for activity that does not cause consumer injury, since it is hard to imagine what harm is caused to consumers by *underestimating* the odds of winning.

[242] *See, e.g., FTC v. Landers*, No. 100-CV-1582 (N.D. Ga. filed June 22, 2000); *New World Bank Servs., Inc.*, No. CV-00-07225-GHK (C.D. Cal. filed July 5, 2001); *Global Network Enters., Inc.*, No. 00-625 (GET) (ANX) (C.D. Cal. 2001).

[243] PMA-NPRM at 4-8.

telemarketing.[244] Nonetheless, the PMA stated that, as a gesture of good faith, they would not oppose the change.[245]

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose before the customer pays, in any prize promotion, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the person's chances of winning, and the no-purchase/no-payment method of participating in the prize promotion.

§ 310.3(a)(1)(v)—Required disclosure of material costs in prize promotions

NACAA expressed concern that original and proposed Rule § 310.3(a)(1)(v) requires that a prize promoter disclose to consumers all "material costs or conditions to receive or redeem a prize that is the subject of the prize promotion" when there should be no costs to receive a prize.[246] NACAA suggests removing the "material costs" portion of subsection (v). The Commission agrees that there should be no costs to receive or redeem a prize. In fact, § 310.3(a)(1)(iv) requires a disclosure that "no purchase or payment is required to win a prize or to participate in a prize promotion." Moreover, § 310.3(a)(2)(v) prohibits misrepresentations "that a purchase or payment is required to win a prize or participate in a prize promotion." Thus the Rule is unequivocal in forbidding conditioning a "prize" on a payment or purchase. Section

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[244] *Id. See also* June 2002 Tr. II at 104-05.

[245] PMA-NPRM at 5, 7. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA, each stating that they do not oppose the disclosure). ARDA stated in its comment that, while it is inconvenient to include additional verbiage in a telephone call, it did not find the additional disclosure unduly burdensome. ARDA-NPRM at 5.

[246] NACAA-NPRM at 6-7 (pointing out that, if there are costs, then the "prize offer" becomes a sales pitch for add-ons, not a prize).

310.3(a)(1)(v) is intended to further clarify that any incidental cost that a consumer must incur—not merely a purchase or payment—must be disclosed in advance to avoid deception and to comply with the Rule. Despite NACAA's comment, the Commission does not believe there is any confusion regarding the role of this provision. Therefore, the Commission has determined to retain the original wording of this provision.

§ 310.3(a)(1)(vi) —Required disclosures in the sale of credit card loss protection

The telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud.[247] Telemarketers of credit card loss protection plans represent to consumers that these plans will limit the consumer's liability if his credit card is lost or stolen.[248] These telemarketers frequently misrepresent themselves as being affiliated with the consumer's credit card issuer, or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually does under the law.[249] In fact, federal law limits this liability to no more than $50.[250]

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[247] *See, e.g.*, NCL-NPRM at 6.

[248] Credit card loss protection plans are distinguished from credit card registration plans, in which consumers pay a fee to register their credit cards with a central party, who agrees to contact the consumers' credit card companies if the consumers' cards are lost or stolen.

[249] NCL-RR at 10. *See, e.g., FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[250] Under § 133 of the Consumer Credit Protection Act, the consumer's liability for unauthorized charges is limited to $50 when there is a

In the NPRM, the Commission proposed two new provisions to address this practice. The first provision—§ 310.3(a)(1)(vi)—requires the seller or telemarketer of credit card loss protection plans to disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. Since many consumers appear to be unaware of the protection they have, the Commission reasoned that a disclosure of the limits of their liability would deter many consumers from paying for protection that duplicates the free protection they already have under federal law. The second provision—§ 310.3(a)(2)(viii)—prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643.[251]

The Commission received little comment on these proposed provisions. Those commenters who addressed the disclosure provision strongly supported it, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[252] In its NPRM comment, NCL reported that fraudulent solicitations for credit card loss protection plans ranked eighth among the most numerous

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signature involved. For transactions where no signature was involved (e.g., where the transaction did not take place face-to-face), the consumer has zero liability for unauthorized charges. 15 U.S.C. 1643.

[251] This approach parallels the Rule's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited. See additional discussion below regarding § 310.3(a)(2)(viii).

[252] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104.

complaints to the NFIC in 2001.[253] The Commission's complaint-handling experience is consistent with that of NCL, with credit card loss protection plans continuing to be a source of consumer complaints. In its comment, NCL pointed out that fraud in the sale of credit card protection plans is particularly pernicious because it usually involves blatant misrepresentations and scare tactics about consumers' liability for lost or stolen credit cards.[254] Furthermore, the fraud is especially egregious because these schemes appear disproportionately to affect older consumers: in 2001, NCL reported, 55 percent of the victims of credit card loss protection plans were age 60 or older, while that age group accounted for only 26 percent of telemarketing fraud victims overall.[255] As noted in the NPRM, large numbers of complaints have prompted both the Commission and the state Attorneys General to devote substantial resources to bringing cases that challenge the deceptive marketing of credit card loss protection plans.[256]

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[253] NCL-NPRM at 6.

[254] *Id.*

[255] *Id.* In its Rule Review comment, NCL reported that in 1999, over 71 percent of the complaints about these schemes were from consumers over 50 years of age. NCL-RR at 10.

[256] *See, e.g., FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 (C.D. Cal. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs., Inc.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00 CV 0906A (SR) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Advanced Consumer Servs.*, No. 6-00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 23, 2000); *Capital Card Servs., Inc.* No. CIV 00 1993 PHX ECH (D. Ariz. filed Oct. 23, 2000); .*FTC v. First Capital Consumer Membership Servs., Inc.*, No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. Liberty Direct, Inc.*, No. 99-1637 (D. Ariz. filed Sept. 13, 1999); *FTC v. Source One Publ'ns, Inc.*, No. 99-1636 PHX RCP (D. Ariz. filed Sept. 14, 1999); *FTC v. Creditmart Fin. Strategies, Inc.*, No. C99-1461 (W.D. Wash. filed Sept. 13, 1999); *FTC v. NCCP Ltd.*, No. 99

NCL supported the Commission's decision to require disclosures and prohibit misrepresentations in the sale of credit card loss protection plans. However, NCL also recommended that the Commission go further and mandate requirements similar to those under the Credit Repair Organizations Act [257]—i.e., written disclosures regarding the consumer's rights, coupled with a written agreement or an agreement signed by the buyer who has three days to cancel.[258] The Commission believes that disclosures coupled with the prohibition against misrepresentation are appropriate and sufficient remedies to cure the problems associated with deceptive sales of credit card loss protection plans. The likely outcome of enforcement of these remedies is that consumers will decline to purchase such plans once they know that they duplicate free protection the law already provides them. The Commission will continue to monitor complaints regarding the sale of these plans to ensure that these provisions are adequate to remedy this problem.

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(1)(vi), to require that this information be disclosed.

CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *FTC v. S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *FTC v. Bank Card Sec. Ctr., Inc.*, No. 99-212-Civ-Orl-18C (M.D. Fla. filed Feb. 26, 1999); *FTC v. Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

[257] 15 U.S.C. 1679.

[258] NCL-NPRM at 6.

§ 310.3(a)(1)(vii)—Disclosures regarding negative option features

The amended Rule adds a new provision, § 310.3(a)(1)(vii), which requires sellers and telemarketers to disclose certain material information any time a seller or telemarketer makes an offer including any "negative option feature" as that term is defined under new § 310.2(t) of the amended Rule. This disclosure, like all of those listed in § 310.3(a)(1), must be made before a customer pays for goods or services. This new provision requires disclosure of all material terms and conditions of the negative option feature.

During the Rule Review, several commenters recommended that the Commission specifically address the problems associated with "free" or "trial" offers that include a negative option feature, particularly when the telemarketer already possesses the consumer's billing information.[259] These offers frequently are presented to consumers as "low involvement marketing decisions"[260] in which they are simply "previewing" the product or service. However, the Rule Review record, as well as federal and state law enforcement experience, show that consumers frequently are confused about their obligations in these transactions, mistakenly believing that, because they did not provide any billing information to the telemarketer, they are under no obligation unless they take some additional affirmative step to consent to the purchase.[261] As a result, such scenarios have

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[259] *See, e.g.* NACAA-RR at 2; NAAG-RR at 11-12, 16-17; NCL-RR at 5-6.

[260] NAAG-RR at 11.

[261] 67 FR at 4501, *citing FTC v. Triad Disc. Buying Serv., Inc.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va.

resulted in significant abuse as consumers discover they have been charged for something they did not realize they had been deemed to have consented to purchase.[262]

In the NPRM, the Commission proposed a broad prohibition on the receipt or disclosure of a consumer's billing information from any source other than the consumer herself. This expansive approach would have obviated the need for a more narrowly-tailored remedy specifically addressing negative options.[263] The Commission believed that without preacquired account information, telemarketers' ability to exploit the negative option scenario to bill charges to consumers' accounts without their knowledge or consent would have been eliminated. The seller or telemarketer would have been required to obtain the account information directly from the consumer, thus putting the consumer on notice that he is agreeing to purchase something.[264]

Based on the entire record in this proceeding, however, the Commission has determined that a blanket prohibition on preacquired account telemarketing sweeps too broadly, curtailing much activity that has not generated a record of consumer harm. As explained in detail below in § 310.4(a)(6) of

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filed May 31, 1997). To this list may be added several more law enforcement actions, including but not limited to actions by state [Attorneys General against BrandDirect Marketing Corp. (Assurances of Discontinuance with the States of Connecticut and Washington); Cendant Membership Services (Consent Judgment with State of Wisconsin); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York); *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance), and additional actions by New York and California against MemberWorks, and by New York against Damark Int'l. *See* NAAG-NPRM at 30, n.73.

[262] *See* 67 FR 4513-14, *citing* NAAG-RR at 11-12.

[263] *Id.* at 4514.

[264] *Id.* at 4512-14.

this SBP, the Commission has refocused this aspect of the amended Rule on the core problem of preacquired account telemarketing, which is to ensure that a customer's consent is obtained before charges are billed to the customer's account, regardless of the source from which the seller or telemarketer obtained the customer's billing information. Therefore, the amended Rule contains a new provision, § 310.4(a)(6), that prohibits charging a customer's account without the customer's express informed consent. As a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a new solution to the problems associated with negative option features is also required.

The amended Rule now takes a two-pronged approach to remedying the harms associated with offers involving negative option features, either alone or in combination with preacquired account telemarketing. Although the record shows that the greatest consumer injury occurs when these two practices occur together,[265] each practice can, and often does, occur without the other,[266] and both, alone or in combination, can be problematic for consumers. Thus, the amended Rule sets forth separate requirements specific to each practice—disclosure requirements for offers with a negative option feature, in § 310.3(a)(1)(vii); and, separately, consent requirements for offers where the telemarketer

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[265] *See* discussion of § 310.4(a)(6) below.

[266] For example, the seller or telemarketer of a magazine or newspaper subscription, who does not have preacquired account information, may make an offer for a subscription that includes an automatic annual renewal by obtaining account information or payment directly from the consumer in the initial transaction. Or, as noted in the NPRM, a customer may have an ongoing relationship with a particular contact lens retailer, in which he expects the retailer to retain account information for future similar purchases, none of which involve a negative option feature. *See* 67 FR 4513, n.196.

possesses preacquired account information, in § 310.4(a)(6). The application of these two separate provisions depends on the details of the transaction, thus addressing with greater precision different potential telemarketing scenarios.

Commenters stressed one issue: the need for consumers to clearly understand and consent to the precise terms of the negative option feature of an offer.[267] The problematic aspect of an offer with a negative option feature is that the consumer's inaction—not an affirmative action taken by the consumer—is deemed to signal acceptance (or continuing acceptance) of an offer for goods or services. By accepting the initial offer (e.g., to try a membership in a buying club service for 30 days, or to receive a daily newspaper for six months) and doing nothing further, the consumer actually contracts to pay for something more (e.g., an automatic annual membership fee or long-term newspaper subscription renewal). In these circumstances, it is crucial that consumers clearly understand the precise terms of such a negative option feature before they agree to accept the initial "free offer" or purchase, since this agreement subjects them to continuing charges, often long-term, if they fail to understand that they must take action to decline the offer or terminate the agreement.

Therefore, new § 310.3(a)(1)(vii) requires that the following disclosures must be made if an offer includes any negative option feature, as that term is defined under § 310.2(t): (1) the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the specific steps the customer must take to

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[267] NACAA-RR at 2; NAAG-RR at 11-12; NCL-RR at 5-6; NAAG-NPRM at 32-33. *See also* ERA-NPRM at 2-3, 16; June 2002 Tr. II at 209-10 (ERA).

avoid the charge(s).[268] As noted above in the discussion of § 310.2(t) defining "negative option feature," that term is intended to reach any provision under which a consumer's failure to take affirmative action to reject the goods or services will be deemed by the seller to constitute acceptance (or continuing acceptance) of goods or services. Thus, the term includes, but is not limited to, "free-to-pay conversions," automatic renewal offers, and continuity plans.[269]

The required material disclosures must be made truthfully, and in a clear and conspicuous manner, before a customer pays.[270] Under the amended Rule's treatment of preacquired account telemarketing,[271] "before a customer pays" shall be construed as meaning before a customer provides express informed consent to be charged for the goods or services offered, and to be charged using a specifically identified account.[272] Thus, § 310.3(a)(1)(vii), and indeed, all of § 310.3(a)(1), must be read in conjunction with new § 310.4(a)(6), which prohibits any seller or telemarketer from

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[268] These disclosures are similar to those required in the Commission's Rule concerning "Prenotification Negative Option Plans." *See* 16 CFR 425.2(a)(1).

[269] Each of these terms describes a form of negative option feature, as discussed in this SBP at § 310.2(t), regarding the definition of "negative option feature," and § 310.2(o), regarding the definition of "free-to-pay conversion."

[270] 16 CFR 310.3(a)(1).

[271] The Commission has determined to include provisions prohibiting the disclosure, for consideration, of unencrypted account information for use in telemarketing in § 310.4(a)(5), and prohibiting unauthorized billing in § 310.4(a)(6) of the amended Rule. As explained below in the discussion of these new provisions, these provisions address the harm caused by sellers or telemarketers who possess preacquired account information, as well as the broader abuse of charging a consumer's account without the consumer's express informed consent, regardless of the nature of the telemarketing transaction.

[272] *See* discussion of § 310.4(a)(6) below.

causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.

§ 310.3(a)(2)—Prohibited misrepresentations in the sale of goods or services

Section 310.3(a)(2) in the original Rule prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction, including: total cost; any material restrictions; any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller's refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller's or telemarketer's affiliation with, or endorsement by, any governmental or third-party organization.[273]

In the NPRM, the Commission proposed three changes to the provision. First, the phrase "in the sale of goods or services" was added to the section to clarify that these prohibited misrepresentations apply only in that context. This change was made because, pursuant to the mandate of the USA PATRIOT Act, the Commission proposed adding to the Rule § 310.3(d), which delineates misrepresentations prohibited in the specific context of charitable solicitations. Second, § 310.3(a)(2)(vii) was modified slightly to conform with proposed § 310.3(d)(7) which is an almost identical provision, but in the charitable solicitation context. Finally, the Commission proposed an additional prohibited misrepresentation regarding credit card loss protection plans.[274]

The Commission received no comments regarding the first two changes, and thus retains these in the amended Rule.

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[273] *See* 16 CFR 310.3(a)(2).

[274] Proposed Rule § 310.3(a)(2)(viii).

§ 310.3(a)(2)(viii)—Misrepresentations regarding credit card loss protection plans

As discussed in detail above, the telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud and, as a result, has been the target of numerous law enforcement actions by both the Commission and the state Attorneys General.[275] In the NPRM, the Commission proposed two new provisions to address this practice. The first provision, in § 310.3(a)(1)(vi), discussed above, requires that sellers or telemarketers of such plans disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. This provision is retained unchanged in the amended Rule.

In addition to advising consumers of their rights, the Commission also believes that additional protection is needed to curb the misrepresentations that are prevalent in the sale of credit card loss protection plans. Telemarketers often misrepresent various aspects of the credit card loss protection plan to consumers, especially the existing legal limits on consumer liability if their cards are lost or stolen.[276] Therefore, the Commission proposed to add a second provision—§ 310.3(a)(2)(viii)—which prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643, which limits a cardholder's liability for unauthorized charges.[277]

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[275] *See* note 256 above.

[276] *See* discussion of § 310.3(a)(1)(vi) above, and notes 249 and 253.

[277] As noted above, this approach parallels the TSR's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case,

The Commission received little comment on this proposed provision. Those commenters who addressed the Commission's proposal strongly supported the provision's method of addressing problems with these plans, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.[278] Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to misrepresent that any customer needs particular goods or services in order to have protections provided pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(2)(viii), which prohibits a seller or telemarketer from misrepresenting that any consumer needs to purchase protections that they already have under 15 U.S.C. § 1643.

§ 310.3(a)(2)(ix)—Misrepresentations regarding negative option feature offers

The original Rule did not specifically require disclosures or prohibit misrepresentations regarding negative option features in telemarketing offers. However, as noted above, in the discussion of § 310.3(a)(1)(vii), as a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a newly focused approach to the problems related to negative option features is also required. This includes specific disclosure requirements, which are set forth in § 310.3(a)(1)(vii) and explained above. Consistent with the structure of the Rule to date, and to ensure that the disclosures are not only made, but made truthfully, the amended Rule includes a mirroring provision to these disclosure requirements, at § 310.3(a)(2)(ix), which

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material facts must be disclosed, and misrepresentations of those facts are prohibited.

[278] DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. *See also* June 2002 Tr. II at 104; and discussion of § 310.3(a)(1)(vi) above.

prohibits misrepresentations regarding "[a]ny material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)."

§ 310.3(a)(3)—Express verifiable authorization

Section 310.3(a)(3) of the original Rule requires that a seller or telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper.[279] The Rule also provides that authorization is deemed verifiable if any of three specified means are employed to obtain it: (1) express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide, upon request, tapes evidencing the customer's oral authorization, including the customer's receipt of the following information: the number, date(s) and amount(s) of payments to be made; date of authorization; and a telephone number for customer inquiry that is answered during normal business hours.[280]

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[279] The use of demand drafts, or "phone checks," enables a merchant to obtain funds from a person's bank account without that person's signature on a negotiable instrument.

[280] *See* original Rule § 310.3(a)(3). Section 310.3(a)(3)(iii)(A) of the original Rule requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

In the NPRM, the Commission proposed to amend the express verifiable authorization provision to require that the seller or telemarketer obtain the customer's express verifiable authorization in any telemarketing transaction where the method of payment lacks the protections provided by, or comparable to those available under, the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA"). In addition, the proposed amendment would have required that the customer receive two additional pieces of information in order for authorization to be deemed verifiable: the name of the account to be charged and the account number, which would have been required to have been recited by either the customer or donor, or the telemarketer. The Commission also proposed to delete § 310.3(a)(3)(iii), which allowed a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation was sent to the customer prior to the submission of the customer's billing information for payment. Finally, the Commission proposed in the NPRM, pursuant to the USA PATRIOT Act, to bring charitable contributions within the coverage of the express verifiable authorization provision.[281]

Based on the record in this proceeding, the Commission has decided to modify the proposed express verifiable authorization provision. The amended Rule prohibits "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the TILA and Regulation Z,[282] or a debit card subject to the protections of the Electronic Fund Transfer Act

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[281] Proposed Rule § 310.(3)(a)(3), 67 FR at 4542.

[282] TILA, 15 U.S.C. 1601 *et seq.* (including the FCBA amendments, at 15 U.S.C. 1637 *et seq.*), and Regulation Z, 12 CFR part 226.

("EFTA") and Regulation E."[283] This modified language draws a "bright line" to simplify compliance. The amended Rule retains the express written authorization and oral authorization provisions (§§ 310.3(a)(3)(i) and (ii) of the original and proposed Rules), with slight modifications, and has reinstated the provision of the original Rule allowing written confirmation, with certain additional requirements and limitations.

In addition, certain modifications to this express verifiable authorization provision have been adopted in the amended Rule pursuant to the mandate of the USA PATRIOT Act. First, where the term "customer" appeared in the original Rule, that term has been replaced in the amended Rule with the phrase "customer or donor" (including, where applicable, the plural form). Similarly, where the phrase "goods or services" had been used in the Rule, it has been replaced with the phrase "goods or services or charitable contribution" to reflect the expansion of the Rule to cover charitable solicitations. And, the term "telemarketing transaction" has been substituted for the term "sales offer," again to reflect the expansion of the provision to cover authorization in the context of a charitable solicitation.

The Commission received numerous comments addressing the proposed amendments to § 310.3(a)(3). In addition, the topic was the subject of extensive discussion at the June 2002 Forum.[284] The major themes that emerged from the record are summarized below.

Express verifiable authorization for novel payment methods. In the NPRM, the Commission noted two separate rationales in support of the requirement that a customer's express verifiable authorization be obtained any time the

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[283] EFTA, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[284] *See* June 2002 Tr. III at 4-52.

payment method used lacks certain protections against unauthorized charges and fails to provide dispute resolution rights. First, the Commission stated its belief that the use of novel payment methods may lead to unauthorized billing.[285] If consumers fail to understand that a telemarketer has the ability to place a charge using a novel payment method (such as utility or mortgage account billing), based on this misperception, they may be induced to divulge billing information that enables such charges. Second, the Commission noted that many emerging payment methods lack both dispute resolution rights and protection against unlimited liability for unauthorized charges.[286] These two facts—that consumers can be charged unwittingly by means of novel payment methods and that the resulting injury due to unauthorized charges is magnified when dispute resolution procedures and liability limits are absent—persuaded the Commission that it was appropriate to require express verifiable authorization when protections pursuant or comparable to TILA and FCBA are absent.[287]

Comments on the requirement for express verifiable authorization in novel payment method scenarios were many and varied. Some industry commenters—with the notable exception of DialAmerica—rejected the notion that novel payment methods should be subject to more stringent requirements under the Rule, arguing that, as long as the consumer has a clear understanding that he or she is purchasing a particular product or service and that the purchase will be charged to a particular account, nothing

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[285] *See* 67 FR at 4507. This concern was also articulated by the Commission in the original rulemaking in connection with the use of demand drafts as a payment method. 60 FR at 43850-51.

[286] *See* 67 FR at 4507.

[287] *Id.*

further should be required of the telemarketer.[288] NACHA advocated scaling back the proposed express verifiable authorization requirement, which it argued was "overly broad" in its coverage of payment methods, such as debit cards, with protections comparable to TILA and FCBA.[289] EFSC noted its concern that emerging payment methods would be disadvantaged because they would be subject to the express verifiable authorization provision.[290]

NAAG, on the other hand, supported the Commission's proposed approach.[291] Some consumer groups urged the Commission to take an even more stringent approach than it did in the NPRM, and require express verifiable authorization in all telemarketing transactions. For example, NCL argued that since most telemarketers use audio recordings to verify

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[288] *See, e.g.*, Aegis-NPRM at 4; Green Mountain-NPRM at 27 ("there is little danger that consumers will give their [debit card] account numbers to telemarketers without knowing that their accounts will be debited"); ITC-NPRM at 5; NATN-NPRM at 4; Noble-NPRM at 4; NSDI-NPRM at 4; and Technion-NPRM at 5. *But see* June 2002 Tr. III at 22 (Dial-America representative noting that his company declines to use novel payment methods because it "had experience with charging people's bank accounts and [ ] also [with] LEC billing, and they have not been good experiences.").

[289] NACHA-NPRM at 2.

[290] EFSC-NPRM at 7. *See also* NATN-NPRM at 4; June 2002 Tr. III at 39. The Commission notes that it was in part because of this concern that the original Rule did not require written authorization in every instance for demand drafts. *See* 60 FR at 43850-51. The amended Rule's allowance for obtaining express verifiable authorization by any of three means, including written confirmation, should obviate concerns about the burden imposed on sellers who choose to accept novel payment methods. Further, the Commission believes, for the reasons stated above, that it is precisely when such novel methods—unfamiliar to the consumer and devoid of legally-mandated consumer protections—are used that express verifiable authorization of a consumer's acquiescence to the transaction is critical.

[291] *See* NAAG-NPRM at 48.

authorizations anyway, it would hardly be burdensome to require express verifiable authorization, which can be evidenced by such a recording, in every instance.[292] In support of this position, NCL offered statistics showing that complaints to the NFIC for 2001 show that 60 percent of the payments for fraudulent buyers club offers—a "category in which nearly all of the consumers said they never agreed to purchase the service"—were made by credit card.[293] According to NCL, even when the payment method used by consumers may be subject to legal protections, "all consumers whose accounts will be billed should have the basic protections that such [express verifiable authorization] provides.[294] LSAP concurred, suggesting that the Rule would better serve all consumers if express verifiable authorization were required in every purchase.[295] Similarly, NCLC urged the Commission to extend the express verifiable authorization requirements to cover all transactions, or at least those not subject to the protection of FCBA and TILA.[296]

The Commission declines to require in every transaction that a seller or telemarketer obtain the express verifiable authorization of a customer or donor prior to submitting billing information for payment. As it made clear in the original rulemaking, the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely, when consumers are unaware that they may be billed via a particular method, when that

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[292] NCL-NPRM at 5.

[293] *Id.*

[294] *Id.* (noting that even when legal protections exist to protect consumers from unauthorized charges, consumers must still bear the burden to "contest the charges in the required manner and time frame to assert their rights"); *see also* LSAP at 10.

[295] LSAP-NPRM at 9-11.

[296] NCLC-NPRM at 8.

method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.[297] However, the Commission agrees that consumers could benefit from a more explicit Rule provision mandating what should be obvious: a transaction is valid only when the telemarketer has obtained the consumer's express informed consent to be charged, and to be charged using a particular account. Therefore, as is discussed in detail below, new § 310.4(a)(6) of the Rule explicitly requires, in every telemarketing transaction, that the seller or telemarketer obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution that is the subject of the transaction. This more explicit treatment will achieve the goals of consumer groups without unduly burdening industry members with the recordkeeping required by the express verifiable authorization provision.

The comments from consumer groups addressing the express verifiable authorization issue opposed the "comparability" standard set out in the proposed amended Rule, *i.e.*, the provision which would have exempted from the requirement to obtain express verifiable authorization any payment method with protections comparable to those available under FCBA and TILA. Some commenters stated that it would be too difficult for merchants to determine, during the course of each telemarketing transaction, whether a given payment method had protections comparable to those

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[297] *See* 60 FR at 43850-51. The Commission notes that despite its request for detailed evidence regarding the cost of obtaining express verifiable authorization and the prevalence of each of the three methods allowed by the original Rule, *see, e.g.*, 67 FR 4537; June Tr. III at 32, there remains a dearth of specific record evidence regarding such costs. Industry commenters who did address the cost merely stated that creating and maintaining audio recordings of express verifiable authorization was "expensive." *See, e.g.*, Capital One-NPRM at 7; June Tr. III at 38 (CCC).

available under TILA.[298] NCL and NCLC argued that the impermanent nature of voluntary policies, such as the "zero liability" guarantees made by MasterCard and VISA, makes them a poor substitute for legal protection.[299] NCLC further argued that such an amendment would "invite sham internal review procedures,"[300] thereby making it deleterious to consumers, by placing the power of determining which transactions required express verifiable authorization in the hands of the merchant.[301]

Industry commenters, on the other hand, urged the Commission to clarify that "comparable protection," whether in the form of a business rule or private contract, should be sufficient to relieve sellers and telemarketers of requirement to obtain express verifiable authorization.[302] In this regard, some industry commenters noted the "zero liability" protection for unauthorized charges provided by the two main issuers of debit cards, VISA and MasterCard, as a voluntary initiative.[303] MasterCard and VISA noted that their respective "zero liability policies" provided greater protection to cardholders than is provided by federal law.[304] Similarly,

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[298] *See* NCLC-NPRM at 2, 4 (noting the exemption from express verifiable authorization for methods of payment with protections comparable to TILA and FCBA "essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue. . ."). Some industry members also noted that the comparability standard was too vague to be useful. *See, e.g.*, CMC-NPRM at 12; EFSC-NPRM at 4 (noting that the vagueness could inhibit the use of novel payment methods).

[299] *See* NCL-NPRM at 5; NCLC-NPRM at 8.

[300] NCLC-NPRM at 7.

[301] *See* NCLC-NPRM at 4-5.

[302] *See, e.g.*, ABA-NPRM at 7-8; BofA-NPRM at 6; Capital One-NPRM at 7; Citigroup-NPRM at 10; DMA-NPRM at 56-57.

[303] *Id.*

[304] *See* MasterCard-NPRM at 4; VISA-NPRM at 5. The Commission notes, however, that the "zero liability" protection offered by MasterCard

Fleet urged the Commission to take note of the unauthorized use liability provisions that VISA and MasterCard offer for debit cards.[305] Other commenters requested that the Commission explicitly state that certain other protections are "comparable."[306]

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and VISA does not come into play in all circumstances. For example, MasterCard extends this protection only to a consumer whose account is in good standing and who has not reported two or more instances of unauthorized use in the past year. *See* http://www.mastercard.com/general/zero—liability.html. VISA offers its coverage only for "VISA credit and debit card transactions processed over the VISA network," and allows the financial institution that issued the card to determine liability for transactions processed over other networks. See http://www.usa.visa.com/personal/secure—with—visa/zero—liability.html?it=f2—/personal/secure—with—visa/.

[305] *See* Fleet-NPRM at 5. *See also* KeyCorp-NPRM at 5; June Tr. III at 11 (DMA) (endorsing voluntary protections).

[306] *See* Capital One-NPRM at 7 (exempt transactions subject to the UCC); CMC-NPRM at 12 (state that protections under the Real Estate Settlement Procedures Act ("RESPA") and EFTA are comparable to those under the FCBA and TILA); Fleet-NPRM at 5 (exempt transactions where the goods or services are subject to a "liberal refund policy"); KeyCorp-NPRM at 5 (exempt transactions subject to the UCC); NACHA-NPRM at 2 (exempt transactions subject to the NACHA Rules); VISA-NPRM at 5 (exempt transactions subject to UCC when the revisions to Article 4 are complete). The Commission declines, at this time, to exclude from the express verifiable authorization requirement transactions subject to RESPA. While the Commission recognizes that RESPA provides important protections for consumers, it does not believe that most real estate transactions would be subject to the TSR at all. And, in instances of mortgage billing, which *would* be subject to the Rule, the Commission believes that consumers, unfamiliar with this method of billing for anything other than their mortgage payment, need the protections of the express verifiable authorization provision. The Commission also declines to exclude transactions subject to the UCC from the requirements of express verifiable authorization, but may revisit this issue when modifications to the UCC are completed. The Commission also declines to exempt transactions subject to the NACHA Rules or for which the seller provides a liberal refund policy, believing that it is preferable to

Based on the record evidence, the Commission has decided to eliminate the "comparability" language from the express verifiable authorization provision. The comments made clear that it is far more desirable to implement a "bright line" rule in this instance to avoid the costs to businesses and consumers of requiring a telemarketer to make a real-time determination of whether a payment method provides adequate protection while on the telephone with a consumer. Moreover, the Commission is persuaded that the impermanent nature of voluntary consumer protections makes them ill-suited as a predicate for circumventing the express verifiable authorization provision.[307] Therefore, the amended Rule requires express verifiable authorization in all transactions where payment is made by a method other than a debit card subject to Regulation E, or a credit card subject to Regulation Z.

Several industry commenters specifically urged the Commission to ensure that express verifiable authorization not be required when a consumer uses a debit card to pay for goods and services offered, or a charitable contribution solicited, through telemarketing. Commenters raised several arguments in support of this position. First, commenters noted that debit cards are not "novel" payment methods.[308] Commenters contended that, on the contrary, debit cards are widely accepted and used by consumers, who understand that by providing their debit card number in a telemarketing transaction, the account with which the card is associated will

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limit exemptions and thus maintain a "bright line" rule to simplify compliance.

[307] *See* June 2002 Tr. III at 29 (NCL) (noting receipt of complaints about the enforceability of these voluntary protections).

[308] *See, e.g.*, ABA-NPRM at 6; DMA-NPRM at 57; and ERA-NPRM at 47.

be debited.[309] Second, commenters argued that debit cards are subject to the protections of the EFTA and its implementing regulation, Regulation E, which provide similar, although not identical, protection to that available under TILA.[310] Third, commenters argued that distant sellers cannot distinguish between a debit and credit card until, in the best case scenario, the consumer reads the entire number.[311] Finally, commenters noted that VISA has an "honor all cards" policy that would prohibit a merchant from declining to accept VISA-branded debit cards if it accepted VISA-branded credit cards.[312] These commenters contended that the practical result

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[309] *See, e.g.*, Collier Shannon-NPRM at 16; Green Mountain-NPRM at 27; June 2002 Tr. III at 24 (ERA).

[310] *See, e.g.*, ABA-NPRM at 2-7; AFSA-NPRM at 18-19; BofA-NPRM at 5-6; Citigroup-NPRM at 10; Collier Shannon-NPRM at 11; KeyCorp-NPRM at 5; MasterCard-NPRM at 4; NACHA-NPRM at 2. Some commenters suggested that any method of payment subject to Regulation E be exempted from the express verifiable authorization requirements. *See* Citigroup-NPRM at 10 (exempt all electronic fund transfers, including wire transfers); EFSC (exempt automated clearinghouse ("ACH") transactions, as well as other novel payments, such as prepaid smart cards). The Commission declines to exempt all electronic fund transfers subject to Regulation E. The record does not support exclusion of other methods of payment subject to Regulation E; and the Commission believes that, despite any consumer protections available, many emerging payment methods covered by Regulation E are still relatively unknown to consumers who will thus benefit from express verifiable authorization when these payment methods are used.

[311] BofA-NPRM at 6; Collier Shannon-NPRM at 6 ("Merchants who process credit and debit card transactions over the phone do not have the ability to differentiate between credit cards and debit cards."); ERA-NPRM at 48; June 2002 Tr. III at 11 (DMA) (noting that "it is impossible for a marketer to know whether it's a debit card or a credit card, in the best instance, until after the entire number has been given"); June 2002 Tr. III at 18 (NRF) (stating that "remote sellers cannot distinguish a debit card from the credit card with any great degree of reliability pre-purchase").

[312] June 2002 Tr. III at 19-20 (NRF) (noting that VISA and MasterCard "have what's called an Honor-All-Cards rule" that requires that merchants

of requiring express verifiable authorization for debit cards would be that express verifiable authorization would have to be obtained in all transactions—whether payment was made by credit or debit card, demand draft, or any other method.[313]

Based on the extensive record on this issue, and on the Commission's law enforcement experience, the Commission has determined to modify the express verifiable authorization provision in the amended Rule. The Commission is persuaded that debit cards should not be subject to the express verifiable authorization provision, based on their wide consumer acceptance and the fact that they are subject to the protections of the EFTA and Regulation E. The Commission believes that debit cards are so commonly used that it cannot persuasively be argued that consumers do not understand that when they provide their debit card account number to a telemarketer, their account can be debited by using that number.[314] Moreover, the Commission is persuaded that the

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accept any card branded with these issuers' logos as a condition of being able to accept the VISA and MasterCard branded credit cards).

[313] Collier Shannon-NPRM at 6-7; June 2002 Tr. III at 11 (DMA) (noting that "[i]n some instances you don't even know [whether a number provided by a consumer is for a debit or credit card] when the number is given, which would force marketers to have express verifiable authorization for everything. . ."). Some commenters argued that such a provision would have the effect of eliminating or reducing the use of debit cards as a form of payment. *See* Gannett-NPRM at 1-2; Intuit-NPRM at 19.

[314] This is not to say, of course, that an unscrupulous telemarketer could not misrepresent the purpose for which it needed such an account number, leading to consumer injury. Section 310.3(a)(4) of the Rule, which prohibits making a false or misleading statement to induce any person to pay for goods or services, would come into play in such situations. Moreover, the record and the Commission's consumer protection experience suggest that, while consumers do understand that their debit cards can be used as a method of payment, it is not clear that consumers understand the varying degrees of consumer protection afforded by credit versus debit cards. *See* June 2002 Tr. III at 24-25. The

practical result of requiring express verifiable authorization when a consumer pays using a debit card would be to require it in all instances when a debit or credit card is used, because it is not currently possible to distinguish these methods in a distance transaction.[315]

Regulation E provides protections that are similar, though not identical, to those provided under TILA. Some commenters argued that express verifiable authorization should be required for debit cards because Regulation E's three-tiered liability scheme for unauthorized use, with increasing liability when the unauthorized use is reported after two business days, is less advantageous for consumers than the TILA protections, which cap a consumer's losses, in all instances, at $50.[316] The Commission believes that this disparity will not disadvantage consumers who face unauthorized charges pursuant to a telemarketing transaction. Both Regulation Z and Regulation E provide that, in a situation where the consumer retains control of the card, no liability shall attach; Regulation Z does so unconditionally,[317] while Regulation E provides such protection on condition that the consumer reports the unauthorized charge within 60 days of transmittal of the consumer's statement.[318] The Commission

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Commission has issued consumer education materials to reinforce the material differences in protection under federal law for debit and credit cards. *See, e.g.*, FTC Facts for Consumers, Credit, ATM and Debit Cards: What to do if They're Lost or Stolen, http:// www.ftc.gov/bcp/conline/pubs/credit/atmcard.htm.

[315] *See* note 311 above.

[316] Compare Regulation E, 12 CFR 205.6(b) to Regulation Z, 12 CFR 226.12(b).

[317] *See* Regulation Z, 12 CFR 226.12(b)(2)(iii), Official Staff Interpretation, Suppl. I.

[318] *See* Regulation E, 12 CFR 205.6(b)(3). The 60-day notification period is somewhat flexible. Section 205.6(b)(4) notes that "[i]f the consumer's delay in notifying the financial institution was due to

believes that, despite the reporting requirement imposed by Regulation E, consumers who face unauthorized charges due to telemarketing fraud have important fundamental protections whether they use a debit or credit card. The Commission will continue its campaign to educate consumers about their varying obligations in reporting unauthorized charges involving both debit and credit cards, and will monitor the effectiveness of this provision from the implementation of the amended Rule through the next Rule Review, making any modifications as necessary.

The record reflects a variety of viewpoints on whether dispute resolution rights are essential to the determination of whether a payment method should be excluded from the requirement of obtaining express verifiable authorization.[319] The Commission continues to believe that dispute resolution protection is a key predicate for excluding a payment method from coverage under the express verifiable authorization provision, to ensure that consumers are not unduly burdened during the investigation of any claim of unauthorized billing. The Commission believes that, although the substantive dispute resolution protections of Regulation E are somewhat less extensive than those of Regulation Z,[320] the core

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extenuating circumstances, the institution shall extend the [time limit] to a reasonable period."

[319] *See* ABA-NPRM at 5, 7 (encouraging the Commission to delete from the express verifiable authorization provision the requirement that any exempt payment mechanism include dispute resolution procedures); Collier Shannon-NPRM at 11-15 (noting that the dispute resolution protections under Regulations E and Z are similar).

[320] For example, unlike Regulation Z, Regulation E does not provide that a consumer may assert against a financial institution all claims (other than tort) and defenses arising out of the transaction and relating to the failure to resolve the dispute. *See* Regulation Z, 12 CFR 226.12(c). However, Collier Shannon argued that, in some instances, Regulation E provides greater consumer dispute resolution rights. For example, Collier Shannon noted that investigations under Regulation E must be completed

protections provided by Regulation E—allowing a consumer to report an unauthorized electronic fund transfer and to receive a provisional credit of the disputed amount within ten business days of the financial institution's receipt of such notice—will afford sufficient basic protection to consumers who choose to use debit cards to pay for goods or services or charitable contributions in telemarketing transactions.

Furthermore, the Commission notes that its decision not to require express verifiable authorization for payments made by debit card is based in part on the practical reality that it is currently impossible for merchants to distinguish credit cards from debit cards, particularly in distance transactions. The Commission believes that the appropriate balance of protecting consumers without unduly burdening industry is best met by excluding debit cards from the requirements of the express verifiable authorization provision, for to do otherwise would result in requiring express verifiable authorization for all credit card payments, an unnecessary and costly burden.[321] The core dispute resolution protection provided by Regulation E, in conjunction with its critical protection against unauthorized charges, will provide a vital safety net for consumers who choose to pay by debit card.

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within ten days of the financial institution's receipt of the consumer's complaint, or a provisional credit must be issued. Collier Shannon also noted that the coverage of the regulations diverges in some instances because some of the dispute resolution protections available under Regulation Z only make sense in the context of a credit transaction, such as the provision that a creditor may not seek to collect funds or issue a negative statement on a consumer's credit report). *See* Collier Shannon-NPRM at Appendix F. The Commission notes, in regard to the argument made by Collier Shannon regarding the shorter time period allowed for investigations under Regulation E, that a shorter time frame is entirely appropriate because the funds at issue are the consumer's, not the funds of a credit card lender.

[321] *See* June 2002 Tr. III at 11 (DMA) (noting that requiring express verifiable authorization in all instances would be "highly expensive.").

Thus, the Commission has determined that express verifiable authorization will be required only in instances when the payment method is not a credit card subject to the protections of Regulation Z or a debit card subject to the protections of Regulation E.[322]

Express written authorization. Section 310.3(a)(3)(i) of the proposed Rule states that authorization will be deemed verifiable if it is by "express written authorization . . . which includes the customer's or donor's signature." The footnote to this section of the Rule notes that "the term 'signature' shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law."

The Commission received few comments on this provision overall. AARP reiterated its long-standing position that all express verifiable authorizations should be in writing.[323] The Commission maintains its position that to require written authorization in every instance would unduly burden sellers and telemarketers, potentially impede the growth of new payment mechanisms, and not provide meaningful benefits to consumers above and beyond those ensured by the other two means of obtaining authorization under the Rule. Therefore, the Commission declines to require written authorization of a transaction in every instance. Another commenter requested clarification that a signed check would meet the requirements of § 310.3(a)(3)(i) of the amended Rule.[324] The original

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[322] Cendant requested that the Commission explicitly note in the Rule that the marketer can rely upon the statement by the consumer identifying the type of billing mechanism that the customer is using to pay. Cendant-NPRM at 9. The Commission believes that its modified approach, exempting from the express verifiable authorization provision both credit *and* debit cards, obviates the need for such a statement to be included in the Rule.

[323] AARP-NPRM at 7.

[324] Tribune at 7.

Rule's express verifiable authorization only pertained to demand drafts; and, as the Commission noted in the TSR Compliance Guide, "[a]ny form of written authorization from a consumer is acceptable," including "a 'voided' signed check." [325] While the language of the amended Rule is arguably broad enough to cover payment methods such as check and money order, the customer's or donor's signed check or money order would, in every instance, be sufficient to serve as written authorization pursuant to 310.3(a)(3)(i).

A handful of commenters addressed the interplay between the E-SIGN Act [326] and the Rule. One industry commenter urged that the Commission explicitly state that the E-SIGN Act governs transactions under the TSR,[327] and another requested the amended Rule expressly adopt the definitions of "electronic record" and "electronic signature" used in the E-SIGN Act.[328] In particular, commenters expressed concern over the Commission's use of the term "verifiable" [329] as a modifier in discussing what would constitute a valid signature under the Rule. While the Commission declines at this time to expressly incorporate the E-SIGN Act's definitions into the Rule, it has determined that deleting the term "verifiable" from the amended Rule will alleviate the concerns expressed

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[325] TSR Compliance Guide at 19.

[326] Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), Pub. L. No. 106-229, 106th Cong. 2d Sess., 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001 *et seq*.

[327] EFSC-NPRM at 9-10.

[328] Intuit-NPRM at 22.

[329] 67 FR 4542. In the NPRM, the Commission noted, in a footnote to § 310.3(a)(3)(i), that "[f]or purposes of this Rule, the term 'signature' shall include a *verifiable* electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law." (emphasis added).

by industry, without compromising the protections afforded to consumers.[330]

NCLC suggested that the Rule incorporate the procedures set forth in § 101(c) of the E-SIGN Act for using electronic records to provide a consumer with written disclosures required by the Rule.[331] Under § 101(c), the consumer must, among other things, affirmatively consent to such use of electronic records and acknowledge that he or she has the hardware and software necessary to access the requisite information electronically. The Commission is deferring any determination at this time as to the specific manner in which the Rule should incorporate these statutory procedures until it has clearer evidence or experience from which to develop an appropriate and effective regulatory interpretation, consistent with the E-SIGN Act, to ensure that written disclosures required under the Rule are provided clearly and conspicuously to consumers if and when a seller or telemarketer uses electronic means to provide such disclosures.[332]

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[330] The Commission believes that the remaining language regarding signatures makes plain that sellers and telemarketers who choose to obtain express verifiable authorization using the express written authorization method, and who wish to use digital or electronic signatures, will need to comply with applicable federal law and state contract law. The Commission believes, by way of example, that a seller or telemarketer who obtained a signature that would be valid under the E-SIGN Act's standards would meet its burden under this provision of the Rule.

[331] NCLC-NPRM at 3.

[332] *See generally* FTC and Dept. of Commerce, *Report to Congress on the Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, June 2001 (noting that nearly all participants in a workshop held to discuss the provision agreed that further study of the provision and its role in the marketplace was necessary). *See also* E-SIGN Act § 104 (preserving agency authority to interpret § 101).

Finally, NCLC suggested that the Commission require that the information set forth in § 310.3(a)(3)(ii)(A)-(G), be required when the written method of express verifiable authorization is used.[333] The Commission declines to adopt this suggestion because the record does not support the argument that such a requirement is necessary in instances when the consumer controls the method of payment, and provides written authorization, including a signature, to the seller or telemarketer prior to the submission for payment of the consumer's billing information.

Oral authorization. The proposed Rule modified and expanded the list of information that must be recited in order for oral authorization to be deemed verifiable. In particular, the proposed Rule added the requirement that the specific billing information of the customer or donor, including the name of the account and the account number that will be used to collect payment for the transaction, must be identified as part of the express verifiable authorization process. Finally, certain wording changes were proposed to address the expansion of the express verifiable authorization provision to cover not just demand drafts, but all methods of payment that lacked specific protections under TILA and FCBA. In addition, the information was reorganized.[334]

In § 310.3(a)(3)(ii) of the amended Rule, the Commission has retained the proposed oral authorization provision, with three minor wording changes. First, the broader term "other billing entity" replaces the term "credit card company,"

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[333] NCLC-NPRM at 10-11.

[334] *See* Proposed Rule § 310.3(a)(3)(ii)(A)-(D), (F)-(G). For example, the term "draft," used in the original provision, was replaced with the phrase "debit(s), charge(s), or payment(s)" in the proposed version, to reflect that methods of payment other than demand draft would now be covered by the Rule. For the same reason, and because of the mandate of the USA PATRIOT Act, the term "payor's" was replaced by the phrase "customer's or donor's."

which was included in the proposed Rule as an example of an entity to whom a seller or telemarketer would need to make available a recording of a customer's or donor's express oral authorization. Second, the phrase "authorization of payment for goods or services or charitable contribution" is inserted to reflect the expansion of this provision to reach charitable solicitations. Third, the term "sales offer" has been replaced with "telemarketing transaction." These last two changes are intended to conform this provision to the mandate of the USA PATRIOT Act.

Few comments were prompted by this section generally, or by any of the specific proposed disclosures required to satisfy the oral authorization provision. One commenter noted that the audio recording method of obtaining express verifiable authorization may require the consent of the customer or donor in states that require two-party consent to record telephone calls.[335] The Commission notes that determining compliance with state law taping requirements has been and will continue to be the responsibility of those sellers and telemarketers who choose to use this method of authorization. Another commenter asked the Commission to state explicitly that "a telemarketer cannot circumvent a writing requirement [such as required by EFTA for recurring drafts] by holding up the express oral authorization in the [TSR]."[336] Clearly, compliance with the EFTA and compliance with the TSR are separate obligations, and to the extent that an entity is subject to both regulations, it must determine how best to comply with both. Therefore, the Commission declines to modify the Rule to include such guidance.

Another commenter, ARDA, requested that § 310.3(a)(3)(ii)(A), which requires disclosure of the number of debits, charges or payments, be modified. ARDA requested that the

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[335] Worsham-NPRM at 6.

[336] NCLC-NPRM at 11.

parenthetical phrase "if more than one" be reinstated in the Rule to ensure that this disclosure is only made in instances where there will be multiple debits, charges, or payments; to do otherwise, ARDA argued, would be a burden on industry to state what would likely be presumed by consumers—that is, that only a single payment will be required.[337] The Commission agrees that the benefit to consumers of disclosing that there will only be a single payment does not outweigh the burden on sellers and telemarketers to have to make such a disclosure. Therefore, the Commission has reinstated the phrase "(if more than one)" at the end of § 310.3(a)(3)(ii)(A). No comments in the record suggest modification of proposed § 310.3(a)(3)(ii)(C) (requiring disclosure of the amount of the debit(s), charge(s), or payment(s)); (D) (disclosure of the customer's or donor's name); (F) (the disclosure of a telephone number for customer or donor inquiry); or (G) (the date of the customer's or donor's oral authorization). Therefore, these sections are retained in the amended Rule without alteration.

Proposed § 310.3(a)(3)(ii)(B) required that "the date of the debit(s), charge(s), or payment(s)" be recited for oral authorization to be deemed verifiable. This proposal drew criticism from members of industry, including MasterCard and KeyCorp, who noted that, in many instances, telemarketers would not possess this information, and suggested that the frequency of the payment could be recited instead.[338] The Commission agrees that in at least some instances the exact date of payment—that is, the date on which the charge will appear on a customer's or donor's billing statement or be debited from a customer's or donor's account—may be unknown at the time of the transaction. Therefore, the amended Rule provision requires instead that the seller or

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[337] ARDA-NPRM at 5-6.

[338] MasterCard-NPRM at 6-7; KeyCorp-NPRM at 5.

telemarketer recite the date on which the debit(s), charge(s), or payment(s) will be submitted for payment. The Commission believes that this piece of information is, or without much burden can be, known to a seller or telemarketer, and that providing this date to the customer or donor will supply a means for determining approximately when such debit(s), charge(s), or payment(s) will be posted to the customer's or donor's account.

Several commenters also expressed concern about the requirement, in § 310.3(a)(3)(ii)(E), that, as part of oral authorization, a customer or donor receive his or her specific billing information, including the name of the account and the account number to be charged.[339] These commenters stated that there are dangers inherent in having a telemarketing sales representative recite or receive from the consumer the consumer's full account number over the telephone.[340]

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[339] *See, e.g.*, AFSA-NPRM at 17-18; CCC-NPRM at 12 (recommending § 310.3(a)(3)(ii)(E) be deleted entirely); DialAmerica-NPRM at 27 (noting its support for the disclosure of the account name); Fleet-NPRM at 6; KeyCorp-NPRM at 5; MasterCard-NPRM at 5 (noting that if the provision is not deleted, the amended Rule should at least exempt from compliance entities subject to the privacy provisions of the GLBA); Wells Fargo-NPRM at 3.

[340] *See, e.g.*, KeyCorp-NPRM at 5; MasterCard-NPRM at 5. These commenters expressed concern about identity theft and unauthorized charges occurring as a result of the express disclosure of this information. Several commenters noted that consumers are disinclined to provide their account numbers in telemarketing, in part due to the success of consumer protection education campaigns that have stressed that a consumer should only provide his or her account number in telemarketing if the consumer knows the seller with whom he or she is dealing. *See, e.g.*, Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; VISA-NPRM at 6-7. Some commenters noted that marketers will not have such account numbers in some instances, such as in preacquired account telemarketing involving a joint marketing program, and thus will be unable to ensure the customer's "receipt" of this information. *See, e.g.*, Household Auto-NPRM at 4; NEMA-NPRM at 8-10 (noting that the " receipt" language directly contradicts the NEMA's guidelines to ensure

On the other hand, comments from consumer groups were generally supportive of the expanded disclosures required as a predicate for oral authorization to be deemed verifiable. NCL noted that billing disputes are prevalent in connection with deceptive or abusive telemarketing, and complaints about such disputes often arise when a consumer has been duped into providing his or her billing information for some bogus purpose, such as "verification," or to enable the seller purportedly to deposit sweepstakes winnings to the consumer's account.[341] NCL also noted that consumers may provide their account information in conjunction with a payment for a particular item, but then be billed for additional goods or services that they did not authorize.[342] Based on its

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that the customer "disclose" such information before processing a charge, and will result in duplicative information being exchanged); Green Mountain-NPRM at 26 (requesting an exemption because the energy industry is highly regulated). As discussed below, the Commission decided to delete the requirement that the account number be disclosed, and therefore the Commission anticipates that this will ameliorate the concern about preacquired account telemarketing. In every instance, the seller or telemarketer should be able to tell the customer or donor the name of the billing vehicle and enough other information to ensure that the customer or donor knows what account will be used to collect payment. As to NEMA's and, to some extent, Green Mountain's concern about redundancy, it is true that in a non-preacquired account call, some information, such as the customer's or donor's billing information, will initially be unknown to the telemarketer. It is equally true that some of the information a customer must receive under § 310.3(a)(3)(ii) is known only to the telemarketer, such as the date a charge will be submitted for payment and a customer or donor service number. The Commission believes that, for payment methods that are novel and lacking in certain consumer protections, it is critical for the customer to authorize the payment. If a seller or telemarketer chooses the express oral authorization method, then it is incumbent upon them to ensure that a consumer receives this information, even if redundant, as part of the recorded authorization.

[341] NCL-NPRM at 4.

[342] *Id.*

experience, NCL "believes that it is important to verify both the account that will be billed and the fact that the consumer is agreeing to purchase specific products or services using that account."[343] NAAG concurred, stating that the proposed Rule's express requirements to recite the account name and number would be beneficial to consumers who, as law enforcement experience demonstrates, may otherwise be unaware of this critical information.[344]

Based on the record, the Commission has decided to modify the proposed provision to limit the required amount of information about an account that must be received by a customer or donor to comply with the express verifiable authorization provision. The amended Rule requires that the customer or donor receive "billing information, identified with sufficient specificity that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution."[345] This more flexible standard takes into account concern about identity theft, but still mandates that the customer receive information sufficient to understand what account is being used to process payment for the transaction. It will allow telemarketers the option to state, for example, the name and the last four digits of the account to be charged, rather than the full account number.

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[343] *Id.*

[344] NAAG-NPRM at 48-49.

[345] Amended Rule § 310.3(a)(3)(ii)(E). The requirement that the account be identified with sufficient specificity that the customer or donor under-stands what account will be used to collect payment mirrors the provision in amended Rule § 310.4(a)(6)(ii)(A), requiring that, in telemarketing transactions involving preacquired account information, a seller or tele-marketer obtain express informed consent by identifying the account to be charged with specificity such that the customer or donor understands what account will be charged.

Written confirmation. The Commission received several comments regarding its proposal to delete § 310.3(a)(3)(iii) from the Rule. This section of the original Rule allows a seller or telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the customer prior to submitting the customer's billing information to be charged. In general, industry commenters opposed the Commission's proposal to delete this provision from the Rule, arguing that, contrary to the evidence presented during the Rule Review, this method of authorization is commonly used in telemarketing.[346] Aegis noted that there is nothing "inherently fraudulent, abusive, or problematic" with this method of obtaining express verifiable authorization, and urged the Commission to retain it.[347] Industry commenters urged the Commission to retain this provision, especially because it provides a low-cost alternative to recording a customer's oral authorization.[348]

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[346] *See, e.g.*, ARDA-NPRM at 5 (noting that the written confirmation method may actually increase in popularity if the additional requirements during oral authorization are adopted in a final Rule); ARDA-Supp. at 1 (noting that the Rule should allow for flexibility given the rapid technological changes in payment methods); CCC-NPRM at 14 (asserting that "this method is readily available, straightforward, reliable and is currently used by many marketers."); CNHI-NPRM at 1 (noting that eliminating this method would place newspapers at "an unfair competitive disadvantage"); EFSC-NPRM at 8; NAA-NPRM at 16 ("many newspapers regularly and legitimately used this method" and would incur considerable expense using the written or oral authorization methods instead).

[347] Aegis-NPRM at 4. *Accord* Noble-NPRM at 4 (arguing there is nothing inherently fraudulent about this method of authorization); PMA-NPRM at 20 (suggesting that the record does not support elimination of this method of authorization); Technion-NPRM at 5 (arguing there is nothing "wrong with" this method of authorization).

[348] *See, e.g.*, Capital One-NPRM at 8; Gannett-NPRM at 1; Intuit-NPRM at 19-20; MPA-NPRM at 27; PMA-NPRM at 20 (urging that this method be retained in part to reduce costs for inbound call centers who,

Consumer groups and law enforcement officials expressed their support for deleting this provision from the Rule, or modifying it to ensure that consumers are better protected when this method is used.[349] NAAG, for example, noted the potential danger inherent in the written confirmation provision as it is worded in the original Rule. Specifically, NAAG opined that consumers are likely to overlook a confirmation that appears to be yet another piece of "junk mail,"[350] and recommended that the Rule be amended to specifically require that any confirmation document sent pursuant to this method of authorization be clearly and conspicuously labeled as such.[351] NAAG also suggested that, if reinstated, the written confirmation method should not be considered a "verifiable" means of obtaining consumers' authorization in circumstances when the consumer is already vulnerable, such as when the goods or services to be paid for are offered in conjunction with a "free-to-pay conversion" or "negative option feature," or when the seller or telemarketer has pre-acquired account information prior to the initiation of the call.[352] MPA suggested that perhaps this method could be reinstated if used in the sale of goods or services for which a liberal refund policy exists.[353] NAAG raised the concern that

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under proposed revisions to address upselling, would need to conduct express verifiable authorization and may not be equipped to do so by taping); June 2002 Tr. III at 40-42 (CCC, noting that written confirmation "is the cheapest way of effectuating a transaction;" ERA, stating that reinstating the written confirmation method will "help balance the additional costs" incurred due to the expansion of the express verifiable authorization requirement).

[349] *See, e.g.*, NAAG-NPRM at 49.

[350] *Id.* (noting that such confirmations "tend to go unnoticed or unrecognized by consumers, thereby failing in their function of 'authorizing' a payment").

[351] *Id.*

[352] *See* June 2002 Tr. III at 42-43 (NAAG).

[353] *Id.* at 44 (MPA).

there might exist a material inconsistency between the disclosures made in the sales portion of the call and those sent as part of a post-call confirmation.[354]

In response to this range of comment, the Commission has decided to reinstate the written confirmation method of obtaining express verifiable authorization, with certain modifications. After balancing the concerns enunciated by consumer groups against industry's strongly-stated desire to reinstate this economical means of obtaining express verifiable authorization, the Commission has determined to modify the provision to enhance the likelihood that consumers will receive these written confirmations in a timely manner and will recognize the confirmations as important documents that should not be thrown away unopened. The amended Rule continues to require that the written confirmation disclose all of the information contained in § 310.3(a)(3)(ii)(A)-(G), as well as a statement of the procedures by which the customer can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate. However, the amended Rule requires that the written confirmation be "clearly and conspicuously labeled" as such, on the outside of the envelope in which it is sent, and that it be sent to the customer by first class mail[355] prior to the submission for payment of

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[354] *Id.* at 48-49 (NAAG).

[355] The requirement that such confirmations be sent via first class mail should cause industry to incur no additional expense. According to the DMA representative at the June 2002 Forum, federal postal regulations require that such confirmations be sent via first class mail. *See* June 2002 Tr. III at 45; *see also* June 2002 Tr. III at 47 (CCC) (noting that company practice is to ensure that written confirmations are clearly and conspicuously labeled). This change to the Rule, then, will merely echo the postal regulations, which require that personalized business correspondence be sent via first class mail. *See* 39 CFR 3001.68, App. A.

the customer's or donor's billing information.[356] The Commission will continue to monitor the use of the post-sale written confirmation method of express verifiable authorization and may revisit this issue in a subsequent Rule Review should circumstances warrant.

The amended Rule also proscribes the use of the post-sale method of authorization when the goods or services that are the subject of the transaction are offered in conjunction with a "free-to-pay conversion" feature and preacquired account information. The record is replete with evidence, detailed in the section below discussing new § 310.4(a)(6), that "free-to-pay conversion" offers, particularly when coupled with the use of preacquired account information, have often resulted in unauthorized charges to consumers.[357] Given this evidence, coupled with NAAG's observation that "[a] consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently 'declined,'"[358] the Commission will require that authorization in such situations must be obtained pursuant to either § 310.3(a)(3)(i) or (ii).

§ 310.3(a)(4)—Prohibition of false and misleading statements to induce the purchase of goods or services or a charitable contribution

The only proposed modification of this provision in the NPRM was to expand it, pursuant to the mandate of the USA

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[356] The Commission has declined, at this time, to follow the suggestion by Capital One that the written confirmation method should be reinstated, "provided that the confirmation is delivered 30 days prior to submission for payment, and the customer is permitted to repudiate the sale within that time by calling a toll-free number," because the record provides too little evidence to suggest that these additional protections are necessary to prevent consumer injury. See Capital One-NPRM at 8.

[357] *See* discussion of amended Rule § 310.4(a)(6), below. *See* also June 2002 Tr. III at 42-43 (NAAG).

[358] NAAG-NPRM at 49.

PATRIOT Act, to encompass misrepresentations made to induce a charitable contribution.[359] The Commission received few comments on this section, and none opposing this proposed expansion.[360] Therefore, the Commission adopts the wording of proposed § 310.3(a)(4) unchanged in the amended Rule.

§ 310.3(b) —Assisting and facilitating

Section 310.3(b) of the original Rule prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. During the Rule Review, the Commission received comments from consumer protection and law enforcement groups who argued that the "conscious avoidance" standard adopted in the original Rule should be modified to a "knew or should have known standard."[361] The Commission noted that it continued to support the "conscious avoidance" standard, believing that such a standard is appropriate "in a situation where a person's liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person."[362] Although the provision was retained in the proposed Rule without amendment, its coverage was expanded to cover assisting and facilitating in the solicitation of charitable contributions pursuant to the USA PATRIOT Act. The Commission invited additional

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[359] Proposed Rule § 310.3(a)(4). *See* 67 FR 4508.

[360] *See, e.g.*, Make-A-Wish-NPRM, *passim* (detailing complaints received by Make-A-Wish, which does not solicit donations by telephone, regarding fraudulent telemarketers claiming or implying that they are calling from or affiliated with Make-A-Wish).

[361] *See* 67 FR at 4508-09.

[362] *Id.* at 4509.

comment on, and proposed alternatives to, the assisting and facilitating standard.[363]

In response to the NPRM, VISA noted that although this provision was retained unchanged in the proposed Rule, "the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities."[364] The Commission believes that the modifications to the pre-acquired account telemarketing provisions in the amended Rule obviate the concerns expressed by VISA.[365]

ARDA expressed its support for retaining the "conscious avoidance" standard, endorsing the rationale enunciated by the Commission in the NPRM for the heightened knowledge requirement.[366] But AARP reiterated its concern that the conscious avoidance standard places too high a burden on law enforcement, and urged the Commission to substitute a "knew or should have known" standard for the assisting and facilitating provision.[367] NACAA also urged the Commission to adopt a "knew or should have known" standard in the amended Rule.[368] NAAG made a similar recommendation, noting that the current standard results in "both federal and state authorities [being] unduly hampered in trying to reduce telemarketing fraud."[369] NAAG also noted that this provision is critical in addressing the participation of those United States-based entities, such as sellers of victim lists, fulfillment

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[363] *Id.*

[364] VISA-NPRM at 12.

[365] *See* discussion of amended Rule §§ 310.4(a)(5) and (6) below.

[366] ARDA-NPRM at 6.

[367] AARP-NPRM at 8.

[368] NACAA-NPRM at 8.

[369] NAAG-NPRM at 56.

house operators, and credit card launderers, who provide necessary assistance to fraudulent telemarketers, many of whom have begun operating from outside the country.[370]

The Commission declines, on the record evidence, to lower the standard for assisting and facilitating under the Rule. The Commission continues to believe the "conscious avoidance" standard is the appropriate one in instances when liability to pay redress or civil penalties rests on another person's violation of the Rule. Further, the Commission believes the "conscious avoidance" standard is one that can be met in situations where third parties provide substantial assistance to fraudulent telemarketers. As stated in the original SBP, this standard "is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance."[371] In the hypothetical situations posed in NAAG's comment, the Commission believes it would be possible to demonstrate such "deliberate ignorance" on the part of, for example, a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints. The Commission itself has brought several cases successfully using the assisting and facilitating provision, and has found the provision to be a useful tool in combating fraudulent telemarketing.[372]

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[370] *Id.* (suggesting that liability for those who assist and facilitate is particularly important when the fraudulent telemarketer holds no assets in the United States).

[371] 60 FR at 43852.

[372] *See* 67 FR at 4509, n.155. *See also FTC v. Allstate Bus. Distrib'n. Ctr., Inc.*, No. 00-10335AHM (CTX) (C.D. Cal. 2001); *FTC v. Sweet Song Corp.*, No. CV-97-4544 LGB (Jgx) (C.D. Cal. 1997); *FTC v. Walton* (d/b/a Pinnacle Fin. Servs.), No. CIV98-0018 PCT SMM (D. Ariz. Jan. 1998).

§ 310.3(c)—Credit card laundering

In the NPRM, the Commission retained the original Rule provision addressing credit card laundering, but noted that the coverage of the provision in the proposed Rule would expand to cover credit card laundering in the solicitation of charitable contributions, pursuant to the mandate of the USA PATRIOT Act.[373] Although the proposed Rule was issued with this provision unmodified, the Commission expressed concern that the provision's "usefulness may be unduly restricted by the phrases '[e]xcept as expressly permitted by the applicable credit card system,' in the preamble to § 310.3(c), and 'when such access is not authorized by the merchant agreement or the applicable credit card system,' in § 310.3(c)(3)."[374]

Having received no comment regarding the credit card laundering provision generally, or regarding the Commission's specific concerns, the Commission has determined to retain this provision in its original form. The Commission will continue to monitor its effectiveness, however, and may reconsider modifications at the next Rule Review.

§ 310.3(d) —Prohibited deceptive acts or practices in the solicitation of charitable contributions

Pursuant to § 1011(b)(1) of the USA PATRIOT Act, the Commission proposed in the NPRM to include in the Rule new prohibited misrepresentations in the solicitation of charitable contributions.[375] The amended Rule retains § 310.3(d) unchanged, with the following exceptions. First, the phrase "after any administrative or fundraising expenses are deducted" has been deleted from § 310.3(d)(4). The Commission believes that the provision is clearer absent this qualify-

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[373] *See* 67 FR at 4509

[374] *Id.*

[375] *Id.* at 4509-10 (discussing the reasoning behind the prohibited misrepresentations included in proposed Rule § 310.3(d)).

ing phrase, and thus has stricken it in the amended Rule. Second, § 310.3(d)(6), the prohibited misrepresentation regarding advertising sales has been deleted. As discussed below, in the section addressing § 310.6(b)(7), the Commission has determined to exempt from the Rule's coverage business-to-business calls to induce a charitable solicitation. As a result, the prohibition against misrepresentations regarding the sale of advertising, which would occur in a business-to-business context, is no longer necessary. Finally, proposed § 310.3(d)(7), prohibiting misrepresentations regarding a charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity, is renumbered in the amended Rule as § 310.3(d)(6).

Section 310.3(d) prohibits misrepresentations regarding certain material information that a telemarketer might choose to convey to a donor to induce a charitable contribution.[376] The goal of the prohibition on these misrepresentations is to ensure that donors solicited for charitable contributions are not deceived, a purpose squarely in line with the mandate of the USA PATRIOT Act, which directed the Commission to include "fraudulent charitable solicitations" in the deceptive practices prohibited by the TSR.[377] Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.[378] As set forth in the NPRM, the Commission believes that if any of the items listed in this section are misrepresented, donors are likely to be misled, as false

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[376] Amended Rule § 310.3(d)(1)-(7).

[377] USA PATRIOT Act § 1011(b)(1).

[378] *See Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

representations of material facts are likely to mislead.[379] Moreover, the Commission's enforce-ment experience shows that often such representations are express, and therefore presumptively material. If implied, such representations are still likely to influence a donor's decision whether to contribute. Therefore, "misrepresentation of any of these [] categories of material information is deceptive, in violation of section 5 of the FTC Act."[380]

In response to the NPRM, some commenters expressed their general support for the USA PATRIOT Act amend-ments, which extended the Rule's coverage to for-profit telemarketers soliciting charitable donations. AARP, for ex-ample, noted its support for the general purposes of the USA PATRIOT Act, stating that the amendments would prevent fraudulent charitable solicitations while still allowing "legiti-mate fundraising appeals."[381] Similarly, NCL noted that the new provisions in the TSR regarding for-profit fundraisers will be "very helpful in curbing deceptive and abusive practices."[382]

Very few comments were received specifically on § 310.3(d) of the proposed Rule. One such comment, from NCL, noted that "[t]he proposed list of prohibited practices covers most of the common abuses that are reported by consumers and businesses."[383] NCL did suggest adding an additional prohibited misrepresentation on "sound-alikes," or the use of a name similar or identical to that of a legitimate charity in an attempt to benefit from that charity's good

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[379] *See Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[380] 67 FR at 4510.

[381] AARP-NPRM at 4.

[382] NCL-NPRM at 2.

[383] *Id.* at 5.

will.[384] Similarly, Make-A-Wish proposed prohibiting misrepresentations of the "identity" of the entity on whose behalf the charitable solicitation is being sought.[385] NAAG and NASCO suggested that the Commission clarify that proposed § 310.3(d)(7), which prohibits misrepresentations regarding "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity," would prohibit misrepresentations of a seller's or telemarketer's affiliation with any charity.[386] The Commission believes that proposed § 310.3(d)(7), renumbered as § 310.3(d)(6) in the amended Rule, is broad enough to prohibit the "sound-alike" misrepresentation NCL raised, as well as to prohibit a misrepresentation regarding one's affiliation with any charity. Therefore, the Commission declines to add a further misrepresentation to specifically address the "sound-alike" scenario, or add the "identity" of the charity to the prohibited misrepresentations.

NAAG and NASCO also proposed one further modification: the addition of a prohibited misrepresentation of "[t]he address or location of the charitable organization, and where the organization conducts its activities."[387] NAAG stated that the addition of such a provision would ensure that telemarketers do not misrepresent that the charities on whose behalf they are soliciting are "local" or that their activities are local, since the local character of a charity or its programs often is material to prospective donors. According to NAAG, because many prospective donors prefer to support organizations that will benefit their own community, fundraisers sometimes take advantage of that sentiment by using a local post office box or other local address as their return address,

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[384] *Id.*

[385] Make-A-Wish-NPRM at 5.

[386] NAAG-NPRM at 53. *See also* NASCO-NPRM at 7.

[387] NAAG-NPRM at 53.

to make it seem as if the charity is based close to the donors.[388]

The Commission believes that any misrepresentation of the charitable organization's location, or the location where the funds are to be used, would likely violate § 310.3(d)(3), which prohibits misrepresentation of the "purpose for which any charitable contribution will be used." Therefore, the Commission declines to include a specific prohibited misrepresentation regarding the address or location of a charity.

D. *Section 310.4 – Abusive Telemarketing Acts or Practices.*

The Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices*."[389] The Act does not define the term "abusive telemarketing act or practice." It directs the Commission to include in the TSR provisions prohibiting three specific "abusive" telemarketing practices, namely, for any telemarketer to: 1) "undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" 2) make unsolicited phone calls to consumers during certain hours of the day or night; and 3) fail to "promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services."[390] The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.[391] Accordingly, the

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[388] *Id.*

[389] 15 U.S.C. 6102(a)(1) (emphasis added).

[390] 15 U.S.C. 6102(a)(3).

[391] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994) (noting that

Commission adopted a Rule that addresses the three specific practices mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's *right to privacy*."[392] Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item,[393] Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry. The calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice[394] also relates to privacy, in that it requires the consumer be given information promptly that will enable him to decide whether to allow the infringement on his time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy

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agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[392] 15 U.S.C. 6102(a)(3)(A) (emphasis added).

[393] 15 U.S.C. 6102(a)(3)(B).

[394] 15 U.S.C. 6102(a)(3)(C).

but are not likely deceptive under FTC jurisprudence. This recognition by Congress, that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse, and its directive to the Commission to rein in these tactics lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and thus prohibited in the original rulemaking are: (1) threatening or intimidating a consumer, or using profane or obscene language; (2) "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;" (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services have been rendered; and (5) "requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit."

The first two of these are directly consistent with the Act's emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.[395] In the SBP for the original Rule, the

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[395] "With respect to the bill's reference to 'other abusive telemarketing activities' . . . the Committee intends that the Commission's rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer's right to privacy." H.R. REP. NO. 103-20 at 8 (1993).

Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics "are clearly abusive in telemarketing transactions."[396] The Commission also noted that the commenters supported this view, and specifically cited the fact that "threats are a means of perpetrating a fraud on vulnerable victims, and [that] many older people can be particularly vulnerable . . . ."[397]

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the Rule under the Telemarketing Act's grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,[398] and gives the Commission discretion in exercising this authority.[399]

As noted above, some of the practices prohibited as abusive under the Act flow directly from the Telemarketing Act's emphasis on protecting consumers' privacy. When the Commission seeks to identify practices as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Com-

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[396] 60 FR at 30415.

[397] *Id.*

[398] 15 U.S.C. 6102(a)(1). The ordinary meaning of "abusive" is (1) "wrongly used; perverted; misapplied; catachrestic;" (2) "given to or tending to abuse,"(which is in turn defined as "improper treatment or use; application to a wrong or bad purpose"). Webster's International Dictionary, Unabridged 1949.

[399] 15 U.S.C. 6102(a)(1).

mission jurisprudence[400] and codified in the FTC Act.[401] This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original Rule. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act's purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.[402] An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers' money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions,[403] and in each

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[400] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh'g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

[401] 15 U.S.C. 45(n).

[402] *Id.*

[403] During 1995 and 1996, the Commission brought or settled lawsuits against numerous individuals and companies involved in nearly a dozen

recovery room operations. *See, e.g., FTC v. Meridian Capital Mgmt.*, No. CV-S-96-63-PMP (RLH) (D. Nev. filed Nov. 20, 1996). The Commission's efforts against recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153—less than one-fifth the record high volume of 869 complaints recorded in 1995. *See* "1995-1996 Staff Summary of FTC Activities Affecting Older Americans" (Mar. 1998). Complaints about "recovery" schemes have continued to decline dramatically, from a number three ranking in 1995 to a number twenty-five ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number twenty-three or twenty-four in terms of number of complaints received by the NFIC). NCL-RR at 11. The Commission continues to take action against fraudulent credit repair schemes; for example, in August 2000, the FTC, the Department of Justice and forty-seven other federal, state and local law enforcement and consumer protection agencies surfed the Web looking for illegal scams that promise consumers that they can restore their creditworthiness for a fee. Over 180 websites were put on notice that their credit repair claims may violate state and federal laws. *See* "Surf's Up for Crack Down on "Credit Repair" Scams," FTC press release dated Aug. 21, 2000). Unfortunately, complaints about advance fee loan schemes rose from a number fifteen ranking in 1995 to the number two ranking in 1998, with about 80 percent of the advance fee loan companies reported to the NFIC located in Canada. NCL-RR at 12. RR Tr. at 378. The Commission and the state Attorneys General continue to launch law enforcement "sweeps" targeting corporations and individuals that promise loans or credit cards for an advance fee, but never deliver them. A sweep was announced June 20, 2000, involving five cases filed by the FTC, 13 actions taken by state officials, and three cases filed by Canadian law enforcement authorities. *See* "FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee," FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Fin. Servs. of N. Am.*, No. 00-792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00-06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Serv.*, No. G-00-324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit

case caused substantial injury to consumers. Amounting to nothing more than out-right theft, these practices conferred no potentially counter-vailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

§ 310.4(a)—Abusive conduct generally

Section 310.4(a) of the original Rule sets forth specific conduct that is considered to be an "abusive telemarketing act or practice" under the Rule. None of the comments in the Rule Review recommended that changes be made to the original wording of §§ 310.4(a)(1)-(3); nor had the Commission's enforcement experience revealed any difficulty with these provisions that would warrant amendment.[404] Although one commenter suggested amendments to § 310.4(a)(4), the Commission determined that no amendment was needed to the language of that provision.[405] Therefore, the language in these provisions was unchanged in the proposed Rule.

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card fees. *FTC v. First Capital Consumer Membership Servs., Inc.*, Civil No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

[404] Section 310.4(a)(1) prohibits as an abusive practice "threats, intimidation, or the use of profane [or obscene language." Section 310.4(a)(2) prohibits requesting advance payment for so-called "credit repair" services. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction.

[405] Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported in its Rule Review comment that the number of complaints it received about such advance fee loan schemes

As noted in the NPRM, however, the Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement "It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule]."[406] The proposed Rule modified the definitions of "telemarketing," and, by association, "telemarketer," to encompass the solicitation of charitable contributions. Consequently § 310.4(a) of the proposed Rule would have applied to all telemarketers, including those engaged in the solicitation of charitable contributions. Each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. As noted in the NPRM, the Commission believes it unlikely that § § 310.4(a)(2)-(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Sections 310.4(a)(1), (5), (6), (7) and (8) of the proposed Rule, however, addressed practices that are not necessarily confined to telemarketing to induce purchases of goods or services. They therefore may have had an impact upon telemarketers engaged in the solicitation of charitable contributions.

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had risen steeply in the five years since the Rule was promulgated. NCL also speculated that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, as evidenced by the numerous complaints about advance fee credit cards. NCL-RR at 11. The Commission noted in the NPRM its belief that the language of § 310.4(a)(4) already prohibits such advance fee credit card offers via telemarketing and that numerous federal and state law enforcement efforts have been directed at such offers. *See* discussion at 67 FR at 4510.

[406] Original and amended Rule § 310.4(a).

The Commission received many comments discussing the proposed modifications to § 310.4(a), and significant time was devoted to these issues at the June 2002 Forum. A summary of the major points on the record regarding the proposed amendments is provided below.

§ 310.4(a)(1)—Threats and intimidation

Section 310.4(a)(1), unchanged in the proposed Rule, specifies that it is an abusive telemarketing practice to engage in threats, intimidation, or the use of profane or obscene language. None of the comments in response to the NPRM recommended that changes be made to the wording of § 310.4(a)(1), although ICFA did request clarification of the term "intimidation," arguing that "a person could potentially claim to have been 'intimidated' simply because a pre-need caller suggested meeting to discuss funeral arrangements."[407] The Commission believes that under the language of the Rule, which focuses on the telemarketer's behavior, to "engage in . . . intimidation" could not reasonably be extended to cover the situation where a telemarketer merely invites a consumer to discuss funeral arrangements, even if the person called finds the prospect of funeral planning an "intimidating" one. Rather, as the Commission noted in the TSR Compliance Guide, this provision is meant to prohibit "intimidation, including acts which put undue pressure on a consumer, or which call into question a person's intelligence, honesty, reliability or concern for family."[408] The Commission believes further clarification is unnecessary, and thus declines to include in the amended Rule a definition of "intimidation." Therefore, the language in this provision remains unchanged in the amended Rule. However, the USA

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[407] ICFA-NPRM at 3.

[408] TSR Compliance Guide at 23 (noting that "[r]epeated calls to an individual who has declined to accept an offer may also be an act of intimidation").

PATRIOT Act expansion of the TSR brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(a)(2) —Credit repair

Section 310.4(a)(2) prohibits requesting or receiving a fee or consideration for goods or services represented to improve a person's creditworthiness until: 1) the time frame within which the seller has represented that the promised services will be provided has expired; and 2) the seller has provided the consumer with evidence that the services were successful—that is, that the consumer's creditworthiness has improved. No change to this section was incorporated in the proposed Rule, except to note its expanded coverage as a result of the USA PATRIOT Act.[409] The only comment received in response to the NPRM was from DBA, which requested that debt collectors be specifically exempted from compliance with this section.[410] As DBA itself noted, debt collection activities do not fall within the Rule's ambit in any event because they are outside the definition of "telemarketing."[411] Therefore, it is unnecessary to exempt debt collectors from compliance with this provision.

§ 310.4(a)(5) —Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing

The Commission has added a new provision, § 310.4(a)(5), which specifies that it is an abusive practice and a violation of the Rule to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing.

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[409] 67 FR at 4512 (noting that "[i]t is unlikely that [this section] will have any significant impact on telemarketers engaged in the solicitation of charitable contributions. . .").

[410] DBA-NPRM at 2-4.

[411] *Id.*

As mentioned above, since the original Rule was promulgated, consumer concern over encroachments on their privacy has become widespread. One response to privacy concerns was passage of the GLBA[412] and its related regulations,[413] under which financial institutions, and the third parties with which they do business, may provide consumer account information to other third parties only in encrypted form for marketing purposes. To do otherwise is not only a violation of the GLBA and its related regulations,[414] but is construed by consumers as a breach of the financial institution's promise to consumers to keep the consumer's account information confidential and secure.[415]

Indeed, trading in unencrypted consumer account numbers has been uniformly condemned by virtually all parties who participated in this rulemaking proceeding. Although there was substantial debate regarding the Commission's proposal for a blanket prohibition on the transfer or receipt of consumers' billing information (*i.e.*, "preacquired account in-

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[412] Gramm-Leach-Bliley Act, *see* note 64 above.

[413] *See* 16 CFR 313.65 (2000) (FTC's Privacy Regulation). *See also* 17 CFR 160; 12 CFR 332; 12 CFR 715; 12 CFR 40; 12 CFR 573; and 17 CFR 248.

[414] *See, e.g.*, 12 CFR 313.12.

[415] *See* AARP-Supp. at 2 (describing the results of a survey AARP conducted in which the majority of consumers reported that they did not believe telemarketers could or should freely share their account information). *See also* Dave Finlayson (Msg. 491) ("I will cease doing business with any firm which gives out my personal private information."); BL (Msg. 1175) ("I also agree that [they should not get a credit card or other account number except from the consumer who chooses to deal with them. . . . This should include not SELLING (not just sharing as stated in our newspaper article) these numbers."); Anonymous (Msg. 3457) ("This is not what any reasonable person would consider "public information.' . . . Why would ANYONE consider this information that they can "share" without the customer's express permission?").

formation"),[416] there was no disagreement among commenters and forum participants about the notion that trafficking in lists of consumer account numbers was improper, in many cases illegal, and should be a violation of the Rule.[417] As ERA explained during the forum:

> [I]f there is a transfer of consumer information without knowledge of and prior to the consumers' consent, which would encompass, for example, your scenario where a list is compiled and a marketer [sold] its list with its credit card numbers to another marketer without telling the consumers on that list that they sold the list of account numbers, I think everyone at this table would agree . . . that this is a violation. . . . We've said in our comments that we would agree to a ban on that. Legitimate marketers don't do that. They don't sell consumer credit card numbers for money.[418]

Given that there is no legitimate reason to purchase unencrypted credit card numbers, the Commission believes there is a strong likelihood that telemarketers who engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers. This conclusion is consistent with the Commission's law enforcement

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[416] Over 50 of the major organizational commenters addressed the issue of preacquired account telemarketing, as did over 200 consumer commenters. In addition, a session of the June 2002 Forum was dedicated to the topic, and generated extensive discussion. *See* June 2002 Tr. II at 116-212.

[417] *See, e.g.*, ERA/PMA-Supp. at 14-15; PMA-NPRM at 14; June 2002 Tr. II at 183 (ERA). *See also* ATA-Supp. at 6; NCTA-NPRM at 12 ("[T]he trafficking of customer account information by unscrupulous telemarketers is a legitimate concern."). Also, the GLBA prohibits this practice on the part of financial institutions. 15 U.S.C. 6802(d); and *see, e.g.* 12 CFR 313.12.

[418] June 2002 Tr. II at 183.

experience.[419] Consumers cannot avoid the injury because they likely are unaware that their credit card numbers have been purchased and that a telemarketer possesses that information when they receive a telemarketing call. In addition, there is no evidence on the record of any countervailing benefits to consumers or competition by trafficking in lists of account numbers. As a result, the Commission concludes that the practice of selling unencrypted lists of credit card numbers is likely to cause substantial and unavoidable consumer injury in the form of unauthorized charges without any counter-vailing benefits. Thus, the Commission has determined to add Section 310.4(a)(5). This provision is consistent with the basic prohibition in the GLBA, and in essence, extends the ban on this practice beyond financial institutions and ensures that all sellers and telemarketers subject to the TSR are prohibited from this practice.

The prohibition in § 310.4(a)(5) is not limited to compilation and disclosure of lists of account numbers. Rather, any disclosure (or receipt) of unencrypted account information violates the Rule, unless the disclosure is for purposes of processing a payment for a transaction to which the consumer has consented after receiving all disclosures and other protections of the Rule. A seller or telemarketer could not, for example, provide or receive account numbers one at a

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[419] *See, e.g., FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) (in which, outside the telemarketing context, defendant purchased unencrypted lists of consumer account numbers, which it used to charge consumers, purportedly for visits to adult websites, despite the fact that many of those charged did not even own computers). In addition, given the evidence that preacquired account telemarketing involving encrypted account information can result in unauthorized charges (as discussed in more detail below), the Commission believes that there is an even greater likelihood of consumer injury when telemarketers have purchased consumers' actual credit card numbers before contacting consumers about an offer.

time in order to circumvent this provision. Nor could a telemarketer obtain account information from consumers on behalf of one seller, and then retain it for sale or disclosure to another seller in another telemarketing campaign.[420]

By "unencrypted," the Commission means the actual account number, or lists of actual account numbers, or encrypted information with a key to unencrypt the data.[421] "Consideration" is not limited to cash payment for a list of account numbers. "Consideration" can take a variety of

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[420] *See, e.g., FTC v. Capital Club*, No. 94-6335 (D.N.J. 1994). According to the FTC complaint in that case, two companies, National Media and Media Arts, which marketed products through infomercials, allegedly sold or rented their customer lists to third-party service companies that sold products and services such as memberships in shopping and travel clubs. The lists contained customers' names, addresses, and telephone numbers, as well as their credit-card types, account numbers and expiration dates. The lists were provided to the service companies without the customers' knowledge or authorization. Some of the Capital Club defendants' roles included maintaining the lists, marketing them to the service companies, and conducting telemarketing calls on behalf of the service companies, according to the complaint. Industry representatives at the June 2002 Forum registered agreement that the Capital Club scenario would run afoul of a ban on trafficking in consumer account information. *See* June 2002 Tr. II at 193 (ERA) ("[T]hat's exactly the scenario that we're talking about that would be prohibited because when that third-party telemarketer retained that account information, it did so as an agent for the seller, so it was not that telemarketer's account information to begin with. They were capturing that for the seller on whose behalf that call was made, so if that telemarketer were then to call a consumer without knowledge and prior consent and use that credit card information again, that would be the kind of a transfer prior to and without consumer consent that we're talking about.")

[421] This, too, is consistent with the financial privacy regulations issued pursuant to the GLBA. See 12 CFR 313.12(c)(1) ("An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.") (emphasis added).

forms, including receiving a percentage of every "sale" using the unencrypted account information.

This provision allows processing a properly obtained payment for goods or services pursuant to a transaction. In addition, pursuant to the USA PATRIOT Act's expansion of the TSR to cover charitable solicitations, the provision also allows for the disclosure or receipt of a donor's account number to process a payment for a charitable contribution pursuant to a transaction. By "transaction," the Commission means a telemarketing transaction that complies with all applicable sections of the Rule, including new § 310.4(a)(6), discussed below, which prohibits any seller or telemarketer from causing a charge to be placed against a customer's or donor's account without that customer's or donor's express informed consent to the charge.[422]

§ 310.4(a)(6)—Causing a charge to be submitted for payment without the consumer's express informed consent

In the NPRM, the Commission proposed a prohibition on "receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing."[423] This proposed provision was prompted by extensive comments during the Rule Review concerning the severity and the scope of harm to consumers related to preacquired account telemarketing.[424] The proposal also arose from the Commission's law enforcement experience in this area, as well as that of the states, which demonstrates the consumer harm that can result

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[422] *See* amended Rule § 310.4(a)(6) and discussion of that provision, below.

[423] Proposed Rule § 310.4(a)(5), 67 FR at 4543.

[424] *See* 67 FR at 4512-14.

from this practice.[425] The comments received in response to the NPRM, however, demonstrate that much preacquired account telemarketing does not necessarily give rise to consumer injury—specifically, unauthorized charges—and in fact may benefit consumers. With this in mind, the Commission has focused more narrowly on the tangible harm, and has crafted precise solutions to the specific abuses evident in instances involving preacquired account information.

Section 310.4(a)(6) of the amended Rule is one of a number of provisions that collectively address the harm caused by certain forms of preacquired account telemarketing. The scope of this section, however, extends beyond the context of preacquired account telemarketing to any instance where the seller or telemarketer causes a charge to be submitted for payment without first obtaining the express informed consent of the customer or donor to be charged, and to be charged using a particular account or payment mechanism. This provision, along with several new definitions (amended Rule § 310.2(o) "free-to-pay conversion," § 310.2(t) "negative option feature," and § 310.2(w) "preacquired account information"), a new provision requiring specific disclosures of material information in any telemarketing transaction involving a negative option feature (amended Rule § 310.3(a)(1)(vii)), and a new provision prohibiting misrepresentations regarding any material aspect of a negative option feature (amended Rule § 310.3(a)(2)(ix)), together are designed to address in a more narrowly-tailored manner the problem originally targeted by the blanket prohibition against receiving account information from any person other than the consumer or disclosing that information for use in telemarketing.

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[425] *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *FTC v. Technobrands, Inc.*, No. 3:02 cv 00086 (E.D. Va. 2002); NAAG-NPRM at 30, n.73; Illinois-Supp. *passim.*

The blanket prohibition proposed in the NPRM, and the issue of preacquired account telemarketing generally, received substantial comment. Consumer groups and law enforcement agencies strongly supported the proposal, citing continued evidence of substantial consumer injury resulting from abusive preacquired account telemarketing practices.[426] Their comments strongly criticized a distinctive feature of preacquired account telemarketing—that is, that it fundamentally changes the customary bargaining relationship between seller and consumer by giving the seller the means to bill charges to the consumer's account without the consumer divulging his or her account number to evidence consent to the transaction.[427]

Industry commenters opposed the proposed provision, making a number of legal and factual arguments. Several industry members suggested that without specific legislative authority, the Commission could not prohibit the transfer of account information under the TSR.[428] A few commenters

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[426] AARP-NPRM at 6-7; AARP-Supp. at 4; EPIC-NPRM at 9; Horick-NPRM at 1 (endorsing EPIC's NPRM comment); NAAG-NPRM at 30-41; NCLC-NPRM at 12-13. *See also* Covington-Supp. at 2-5; and NCL-NPRM at 6 ("Checks and money orders are no longer the most common methods of payment in telemarketing complaints made to the NFIC. As NCL noted earlier, demand drafts, credit cards, debit cards, utility bills, and other types of accounts are increasingly used for payments. Sometimes consumers contend that they never provided their account numbers to the telemarketers; many of these complaints say they never even heard of the companies before they received their bills or bank statements.").

[427] NAAG-NPRM at 30; NCL-NPRM at 7. *See also* Covington-Supp. at 2-5.

[428] ATA-NPRM at 18 (arguing that, because the Telemarketing Act made no reference to preacquired account telemarketing, the Commission cannot regulate it); Cendant-NPRM at 6 (similar argument to ATA); CCC-NPRM at 8; DMA-NPRM at 41-42 (arguing that the Commission lacks authority under Telemarketing Act to establish a law violation based on unfairness standard); ERA-NPRM at 20 (same argument as DMA); Green Mountain-NPRM at 29-31; Household Auto-NPRM at 5; PMA-

argued that the Commission lacked record evidence sufficient to support the proposed prohibition.[429] It bears noting that, although business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was "very important" to them, they provided scant information that would help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.[430] By contrast, the record of consumer injury arising from preacquired account telemarketing scenarios was extensive at the time of the Rule Review.[431]

NPRM at 16 (same argument as DMA and ERA). Contrary to these assertions, the Commission has the authority to define and restrict deceptive and abusive telemarketing acts or practices, pursuant to the Telemarketing Act. Moreover, the Commission has analyzed proposed Rule provisions addressing abusive practices under the FTC Act's unfairness standard to narrow, not expand, the scope of activities brought under the purview of the statute. 67 FR at 4511. The unfairness standard requires that several specific elements be met before an act or practice may be deemed "unfair" under the FTC Act. See 15 U.S.C. 45(n) and discussion of § 310.4(a) above. If anything, the Commission is taking a more conservative approach in analyzing what constitutes an "abusive practice" than is required under the Telemarketing Act.

[429] DMA-NPRM at 39, 41; Household Auto-NPRM at 5; MPA-NPRM at 21-22.

[430] *See* 67 FR at 4512-14; and June 2002 Tr. II at 211-12 (E. Harrington) ("One of the reasons that the Commission has proposed a prohibition is because it looked very carefully at the record of the request for justification for the practice and found it is sorely wanting. Why this needs to happen, in other words, has been a real mystery to us, why it is that companies should be permitted to get account information from third parties and have it at the time that they call a prospective customer, charge that account information and oftentimes not obtain consent for that.").

[431] *See* 67 FR at 4512-14. Moreover, the evidence continues to mount as the Commission and states continue to bring law enforcement

Three arguments echoed throughout virtually all industry comments received in response to the NPRM. First, financial institutions, as well as other industry members, argued that the proposal was unnecessary or improper in light of the enactment of the GLBA and the various regulations thereunder.[432] Specifically, these commenters argued that the issue of releasing account information for marketing purposes already has been dispositively addressed in the GLBA and its implementing regulations, with a different result from that proposed by the Commission in the TSR.[433] Commenters

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actions involving these practices. *See, e.g.*, NAAG-NPRM at 30, n.73; Minnesota-Supp. *passim*; Illinois-Supp. *passim*.

[432] Advanta-NPRM at 3; Allstate-Supp. at 2; ABA-NPRM at 8; ABIA-NPRM at 1; AFSA-NPRM at 11-12; AmEx-NPRM at 4-5; ATA-Supp. at 5; Assurant-NPRM at 6; BofA-NPRM at 7; Bank One-NPRM at 2-3; Capitol One-NPRM at 8; Cendant-NPRM at 6-7; CBA-NPRM at 9; Citigroup-NPRM at 8-9; CCC-NPRM at 9; CMC-NPRM at 13; Discover-NPRM at 5-6; E-Commerce Coalition-NPRM at 2; Eagle Bank-NPRM at 4; FSR-NPRM at 7-8; Fleet-NPRM at 4-5; Household Auto-NPRM at 5; Household Bank-NPRM at 2, 7-9; Household Finance-NPRM at 2, 5; HSBC-NPRM at 3; KeyCorp-NPRM at 4; MasterCard-NPRM at 7; MBA-NPRM at 3; MBNA-NPRM at 5; Metris-NPRM at 2-4; NRF-NPRM at 21; PCIC-NPRM at 2; VISA-NPRM at 6; Wells Fargo-NPRM at 3; Letter from Reps. Ney, Sandlin, Jones, Cantor, and Shows to Chairman Timothy Muris, dated Apr. 15, 2002; Letter from Sens. Hagel, Johnson, and Carper to Chairman Timothy Muris, dated Apr. 17, 2002. See also Letter from Rep. Manzullo to Chairman Timothy Muris, dated Apr. 12, 2002 (suggesting that the blanket prohibition on transferring or receiving billing information "seems excessive"); and Letter from Sen. Inhofe to Chairman Timothy Muris, dated Mar. 22, 2002 (same).

[433] ABA-NPRM at 8; BofA-NPRM at 7; Bank One-NPRM at 2-3; CBA-NPRM at 9; Discover-NPRM at 5. *See also* CMC-NPRM at 14 ("We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason, we think the Rule should impose no more stringent limits on the sharing of billing information than the [GLBA and the Commission's privacy rule impose.").

noted that the various privacy regulations under the GLBA prohibit sharing account numbers with telemarketers, but provide exceptions for encrypted information, sale of an entity's own product through an agent, and co-branding and affinity programs. Thus, they argued, "since the proposed Rule fails to include these exceptions, it is inconsistent with the GLBA regulations, rendering the regulations irrelevant."[434] NAAG challenged these arguments, pointing out that the goals of the GLBA and the TSR are very different. NAAG expressed the view that the GLBA did not address the economic injury to consumers caused by preacquired account telemarketing, as it was focused on the privacy of account information; thus there is no conflict between the regulations, as they are aimed at different consumer harms.[435] According to NAAG:

> The essential characteristic of [preacquired account telemarketing] is the ability of the telemarketer to charge the consumer's account without traditional forms of consent. . . . The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquired the ability to charge a consumer's account affects the bargaining power between the telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. . . . [Indeed as] a result of the [GLBA and implementing regulations] . . . vendors . . . can still send through charges to consumers' accounts without consumers giving their credit card numbers. . . . This

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[434] ABA-NPRM at 8. *See also* ABIA-NPRM at 2 (arguing that the proposed provision "would . . . disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA"); AFSA-NPRM at 11; AmEx-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3; Cendant-NPRM at 6-7; CMC-NPRM at 13.

[435] NAAG-NPRM at 41-43.

> allows the same [preacquired account telemarketing] process to continue. . . .[436]

Another common theme in industry comments on this issue was that the use of preacquired account information in telemarketing provides protection for consumers from identity theft perpetrated by individual telemarketing agents, and assuages consumers' concerns about divulging their account information.[437] According to one such commenter, having consumers provide billing information over the telephone:

> will actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use. . . . Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users.[438]

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[436] *Id.* at 43. *Accord* Covington-Supp. at 2-5.

[437] NPRM at 7; Bank One-NPRM at 3-4; Capital One-NPRM at 9; Cendant-NPRM at 7; Household Auto-NPRM at 2, 5; Household Bank-NPRM at 2, 7; Household Finance-NPRM at 2, 7; MasterCard-NPRM at 7; MPA-NPRM at 24; Metris-NPRM at 2, 5-7; NRF-NPRM at 20; Time-NPRM at 8-9; VISA-NPRM at 6-7; Wells Fargo-NPRM at 3. See also June 2002 Tr. II at 124-25 (CCC); Id. at 133 (PMA) and 194-95 (DialAmerica).

[438] AmEx-NPRM at 8. Accord Assurant-NPRM at 5; Bank One-NPRM at 3-4. Additionally, several commenters suggested that the blanket prohibition was "inconsistent with the longstanding and well considered advice [of the Commission and other consumer protection groups and law enforcement agencies] that they not release their account numbers to telemarketers. . . ." MasterCard-NPRM at 7. Accord BofA-NPRM at 7; Bank One-NPRM at 3. See also ABA-NPRM at 8; Metris-NPRM at 6. In fact, the Commission's advice has not been to refuse to divulge account information in any telemarketing transaction, but rather only to divulge such information when the seller is known to the consumer. *See, e.g.*, "Facts for Consumers: Are You a Target of . . . Telephone Scams," http:// www.ftc.gov/bcp/confine/pubs/tmarkg/

A number of commenters pointed out that the GLBA implementing regulations assume the confidentiality benefits of transferring encrypted account information so that consumers would not have to provide such information during the marketing transaction.[439] Other commenters noted some contradiction in industry's identity theft argument, suggesting it is illogical to assert that a telemarketer cannot be trusted with a consumer's account information, but that same telemarketer can be trusted to tell the seller truthfully that the consumer has provided express informed consent to the purchase, absent obtaining any part of the account number from the consumer.[440] One such commenter further suggested that the best protection against individual telemarketers per-

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target.htm; and "Consumer Alert: Customized Cons Calling," http://www.ftc.gov/bcp/confine/pubs/alerts/ consalrt.htm. Moreover, the reason for this advice is not to avoid identity theft, but to protect consumers from fraudulent telemarketers selling bogus goods or services. *Id.* In the identity theft context, the danger identified by the Commission and discussed in its publications is not the potential misuse of account information that a consumer has provided in the course of a sale of goods or services, but rather "pretexting"—*i.e.*, the practice of eliciting a consumer's personal information under false pretenses, such as claiming to be from the consumer's bank, calling to confirm the consumer's account information. *See* "Pretexting: Your Personal Information Revealed," http://www.ftc.gov/bcp/confine/pubs/ credit/pretext.htm.

[439] Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; Metris-NPRM at 5; E-Commerce Coalition-NPRM at 3; VISA-NPRM at 6-7.

[440] June 2002 Tr. II at 130-31 (AARP), 143 (NAAG), and 205 (NCL). Indeed, in both their Rule Review and NPRM comments, NAAG provided several examples of instances where obviously confused elderly consumers were charged for products or services using preacquired account information, despite no clear evidence of consent during the telemarketing call. NAAG-RR at 11 and Exs. 2-4 attached thereto; NAAG-NPRM at 32, and Ex. B attached thereto. *See also* Synergy Global-NPRM at 1-2 (comments from a former teleservices agent stating that he was encouraged by his superiors to "falsify sales in an attempt to artificially inflate the statistics compiled nightly").

petrating identity theft is proper screening, training, monitoring and supervision of salespeople.[441] In addition, the vast majority of non-cash transactions in both telemarketing and face-to-face retail situations entail the consumer's disclosure of his or her account number to the seller's representative.[442] The record does not reveal any reason to support the notion that the risk of identity theft is any different in these transactions than in transactions where the seller has opted to make use of preacquired account information.

The third recurring theme in industry comments on this issue was the existence of a variety of efficiencies for both sellers and consumers. Among the most common examples cited was avoiding error in the transmission of account numbers from consumer to telemarketer, as either the consumer misstates or the telemarketer miskeys the account number.[443] Another benefit cited by numerous industry commenters was the reduction of time on the telephone to complete the transaction in the initial call,[444] particularly in

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[441] NCL-NPRM at 7.

[442] NAAG-RR at 10. Indeed, NEMA described its own current procedures, under the Uniform Business Practices guidelines created for the retail energy market, whereby it obtains complete billing information directly from each customer as proof of the customer's intent to switch utility providers. NEMA-NPRM at 8-9.

[443] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7; Cox-NPRM at 33; Metris-NPRM at 7.

[444] *See, e.g.*, MPA-NPRM at 24 ("The Commission must also not underestimate the economic efficiencies such practices afford to businesses. . . . It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting that increase could be 60 seconds or more.") *See also* Cox-NPRM at 33; Metris-NPRM at 6-7; NCTA-NPRM at 12; Tribune-NPRM at 8. MPA's argument on this point is somewhat contradicted by its recommended alternative to the prohibition, express verifiable authorization, which involves additional

upsells.[445] As DMA noted, "it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and the consumer."[446] The final benefit cited in several comments was that preacquired account telemarketing helped consumers by enabling them to avoid the inconvenience of having to pull out their wallets in order to make a purchase.[447] This alleged benefit was sharply questioned by consumer advocates, who argued that whatever time savings or convenience may accrue from the use of preacquired account information does not offset the potential harm from its use.[448] The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of

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expense, regardless of the method of express verifiable authorization selected. *See* MPA-NPRM at 26-29. NCL challenged this proposition, suggesting that, on the contrary, "[r]equiring telemarketers to ask for [the consumer's account number] would benefit both parties by helping to confirm a consumer's intention to make the purchase and the correct account that will be used for that purchase, reducing the potential for billing disputes later." NCL-NPRM at 7.

[445] Associations-Supp. at 5-6; DMA-NPRM at 40. *See also* PMA-NPRM at 18-19; Time-NPRM at 8.

[446] DMA-NPRM at 40. See also Time-NPRM at 8.

[447] Assurant-NPRM at 6; June 2002 Tr. II at 125 (CCC).

[448] *See, e.g.*, June 2002 Tr. II at 131 (AARP) ("To imply that . . . it's more inconvenient for the consumer to get their credit card than to have an unknown source debit their account without their knowledge, I don't think any consumer would ever agree with that statement.")

ensuring that a consumer has indeed consented to a transaction.[449]

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[449] Covington-Supp. at 2-5:

> "The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what's taking place; there can be no misunderstanding. . . . Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase . . . . This short-hand method for consumers to signal assent to a deal leaves complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary."

Indeed, this conclusion derives from the actual experience of a telemarketing firm that engages in preacquired account telemarketing. See Letter from Stephen Calkins to the FTC, dated October 28, 2002 ("Calkins Letter"). This firm attempted to cure the high customer return rates generated by this practice in several ways, including adjusting the disclosures and reading at least four digits of the account number to the consumers during the call. *Id.* at 2. The firm found that none of these attempted cures ensured that consumers "knowingly consented" to the purchase while maintaining a competitive level of sales. *Id.* at 1-2. Only when the firm began requesting a portion of the account number from the consumer herself did complaint rates drop significantly, without an unacceptable drop in sales. According to the commenter, "Sales were about 25% lower than when the telemarketer read those digits to the consumer, but consumers really understood that they were making purchases . . . . My client believes that consumer complaints pertaining to their intent to purchase dropped, and that his seller clients now experience an acceptable level of product returns." *Id.* at 2-3. *See also* June 2002 Tr. II at 139-44 (NAAG); NACAA-NPRM at 6 ("That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction."); Vermont-Supp. *passim* and attachment. AARP commissioned a survey by telephone on June 14-19, 2002, among a nationally representative

As it stated in the NPRM, the Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer's account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted. In such a case, what is customarily under the sole control of the consumer—whether to divulge one's account number, thereby determining whether to accept the offer and how to pay for it—is now in the hands of the seller or telemarketer.[450] This reversal in the traditional para-

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sample of 1,240 respondents 18 years of age and older. Participants were asked a handful of questions, such as, "Often telemarketers ask you to buy something with a credit card or debit card. Do you think telemarketers are able to cause charges to your credit card or debit card without getting your credit or debit card numbers directly from you?" Only 30 percent of respondents stated that they were aware that telemarketers have the ability to cause a charge to their credit or debit card accounts without getting the account numbers from them. AARP-Supp. at 2. That number was higher in the instance of upsells, but still less than half of the respondents understood that it was possible to be charged without providing account information to a seller or telemarketer. *Id.* Additionally, the majority (80 percent) of respondents stated that they thought telemarketers should only be able to cause charges to their credit or debit card accounts if the consumers expressly provide their account numbers to the seller or telemarketer. *Id.* at 4; Vermont-Supp. at 2-3. The survey addresses a fairly complex issue in broad terms. For example, it does not tease out the specific instances where a consumer might actually have an expectation that the seller will retain and reuse the consumer's account information, such as the contact lens seller who, with the consumer's permission, retains the consumer's account information to facilitate quarterly lens purchases. The results do, however, provide insight into the general expectations of consumers when engaging in telemarketing transactions.

[450] State law enforcers, consumers and consumer groups, as well as some industry members, consistently voiced concerns over the shift of control over a transaction from the consumer to the seller or telemarketer,

digm is not one that is generally expected or favored by consumers, who consistently state that, as a general proposition, they do not believe it is or should be possible for them to be charged if they do not provide their account number in a transaction.[451] The Commission understands this to mean

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and noted consumer disbelief that purchases could actually be made without their ever disclosing payment information. *See* 67 FR at 4513; June 2002 Tr. II at 130-32 (AARP); Covington-Supp. at 2, 5; EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; June 2002 Tr. II at 139-44 (NAAG). But see CMC-NPRM at 13 (questioning this proposition).

[451] *See* 67 FR at 4513; AARP-Supp. at 4 (*see* note 449 above, describing survey showing that the majority of consumers do not believe their accounts can, or should, be charged by telemarketers without obtaining the account number directly from the consumers); June 2002 Tr. II at 131-32 (AARP); EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; Vermont-Supp. at 2-3. As Minnesota explained during the June 2002 Forum:

> "In a preacquired situation, the consumer doesn't have that control because we have shorthand ways of signaling consent in our society. We aren't many lawyers out there. Josh, who . . . has a trade school degree and comes home from a job and Esther is sitting on the couch at 85 years old doesn't understand all this. . . . They just get a call from somebody. What they know is I've got to sign my name, I've got to give somebody my credit card or in the context of a telemarketing transaction, I have to read my account number to the person or I have to pay cash, and what this does is by circumventing those forms of consent, it makes it impossible for consumers to control the transactions."

June 2002 Tr. II at 140. See also James Andris (Msg. 171) ("Our mortgage company has been deducting a monthly premium, via our mortgage payment, to a 3rd party insurance policy. I have written a letter demanding refunds for the payments for 16 months. We, my wife and I, never gave written or verbal permission for such payments to either parties [sic]."); Albert Bruce Crutcher (Msg. 229) ("I also favor not allowing my credit card and account numbers to be given out by anyone other than ME!!"); Harold D. Howlett (Msg. 300) ("Do not allow telemarketers to obtain and use credit card or other account information from anyone except the

that, generally speaking, consumers believe they ordinarily signal their consent to an offer by providing their account information to the seller or telemarketer.

Although some commenters argue that this shift in the normal paradigm of offer and acceptance is, in and of itself, inherently unfair,[452] the record overall suggests that, in general, it is not preacquired account telemarketing per se that is harmful, but rather the abuse of preacquired account information that causes the harm.[453] Commenters persuasively note that there are many transactions involving preacquired account information that are beneficial to, indeed sometimes expected by, consumers. For example, as noted in the NPRM, "a customer who places quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information."[454] Similarly, a customer who provides his account number to make a purchase in an initial telemarketing transaction may be frustrated to have to repeat that account information to consummate certain upsell transactions, particularly when the upsell is offered by the same telemarketer.

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consumer. . . ."); Carole & Cory Walker (Msg. 810) ("Every year we have at least one unauthorized charge to our card and we are extremely cautious with our information.").

[452] *See, e.g.*, EPIC-NPRM at 9; NAAG-NPRM at 30; NCL-NPRM at 5-7.

[453] ERA-NPRM at 16; Household Auto-NPRM at 5; PMA-NPRM at 17. Other commenters asserted that using preacquired account information is not inherently fraudulent. *See* Allstate-Supp. at 2; Associations-NPRM at 4; ATA-NPRM at 19; ATA-Supp. at 5-6; ERA/PMA-Supp. at 10; ITC-NPRM at 5; NCTA-NPRM at 11; Noble-NPRM at 3; NATN-NPRM at 3; NSDI-NPRM at 3; PMA-NPRM at 13-16; Technion-NPRM at 4; TRC-NPRM at 3; Time-NPRM at 7.

[454] 67 FR at 4513.

In that case, there may be an expectation that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago.[455] As another commenter pointed out during the Rule Review, the key to such transactions is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase.[456]

The record shows that the specific harm resulting from the use of preacquired account telemarketing is manifested in unauthorized charges.[457] These may appear not only on con-

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[455] *See*, e.g., June 2002 Tr. II at 196 (Time) ("[T]he catalog clients that we deal with that are . . . selling our magazines on our behalf . . . tell us that the cost would be loss of sales of the catalog products because the customers would just be so annoyed about having to give the credit card number again that they just gave.")

[456] 67 FR at 4513, n.196.

[457] In its supplemental comment, Minnesota argued that evidence gathered in its law enforcement actions showed that consumers consistently stated that they had not authorized charges arising out of preacquired account telemarketing, particularly when the offers involved "free-to-pay conversion" features:

> "The data we have reviewed in our investigations uniformly supports our impression that underlying the high cancellation rates with preacquired account telemarketing is consumer sentiment that the charges were unauthorized. In addition to the survey of Fleet Mortgage Corporation customer service representatives presented in the prior NAAG Comments [see NAAG-NPRM at 31-32], an investigation of a subsidiary of another of the nation's largest banks revealed a similar pattern. During a thirteen month period, this bank processed 173,543 cancellations of membership clubs and insurance policies sold by preacquired account sellers. Of this number of cancellations, 95,573, or 55 percent, of the consumers stated unauthorized billing as the reason for the request to remove the charge. The other primary reason given for canceling (by 56,794 customers, or 32% of the total) was a general "request to cancel" code that

sumers' credit card or checking accounts, but also on mortgage statements and other account sources not traditionally used to pay for purchases.[458] Of course, unauthorized charges are not exclusively associated with preacquired account telemarketing. The Commission has brought numerous law enforcement actions against sellers and telemarketers alleging violations of the FTC Act for the unfair practice of billing unauthorized charges to consumers' accounts in a variety of contexts not involving preacquired account information, including but not limited to: advanced fee credit card offers,[459] sweepstakes,[460] vacation or travel packages,[461] credit card loss protection offers,[462] and magazine subscriptions.[463] Thus,

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may have also included many consumers claiming unauthorized charges."

Minnesota-Supp. at 4.

[458] NAAG-NPRM at 31 ("Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account.")

[459] *See, e.g., FTC v. Corporate Mktg. Solutions*, No. CIV-02 1256 PHX RCB (D. Ariz. filed July 8, 2002); FTC v. Capital Choice, No. 02-21050-CIV-Ungaro-Benages (S.D. Fla. filed Apr. 15, 2002); *FTC v. Fin. Servs. of N. Am.*, No. 00792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. SureCheK Sys., Inc.*, No. 1:97-CV-2015-JTC (N.D. Ga. filed July 9, 1997); *FTC v. Thornton Communications, Inc.*, No. 1 97-CV-2047 (N.D. Ga. filed July 14, 1997).

[460] *See, e.g., FTC v. New World Servs., Inc.*, No. CV-00-625 (GLT) (C.D. Cal. filed July 5, 2000); *FTC v. Hold Billing, Ltd.*, No. SA-98-CA-0629-FB (W.D. Tex. filed July 15, 1998).

[461] *See, e.g., FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Dec. 1996); *FTC v. Disc.* Travel, No. 88-113-CIV-FtM-15C (M.D. Fla. filed Aug. 8, 1988); *Citicorp Credit Servs.*, 116 F.T.C. 87 (1993).

[462] *See, e.g., FTC v. Andrews*, No. 6:00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 2000); *FTC v. First Capital Consumer Membership Servs.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Consumer*

in essence, preacquired account telemarketing has proven in certain circumstances to be an additional, but not the only, vehicle for imposing unauthorized charges on consumers in telemarketing transactions.

One of the problems, therefore, with the proposed prohibition on receiving billing information from a source other than the consumer or sharing it with others for the purposes of telemarketing is that it fails to remedy patterns of unauthorized billing that occur even though preacquired account information is not used. As our cases amply demonstrate, the practice unequivocally meets the criteria for unfairness, and therefore violates Section 5 of the FTC Act.[464] Yet until now, the Rule has not specified that unauthorized billing is an abusive practice and a Rule violation.[465] The Commission therefore has decided to add § 310.4(a)(6) to correct that deficiency. The new provision specifies that it is an abusive practice and a violation of the Rule to cause a charge to be

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Repair Servs., Inc., No. 00-11218 CM(RZx) (C.D. Cal. filed Oct. 23, 2000); *FTC v. Capital Card Servs.*, No. CV 00 1905 PHX EHC (D. Ariz. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs.*, No. 00CV0905C(F) (W.D.N.Y. filed Oct. 26, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00-CV-906 (W.D.N.Y filed Oct. 23, 2000); *FTC v. OPCO Int'l Agencies, Inc.*, No. CO1-2053R (W.D. Wash. filed Feb. 2001).

[463] *See, e.g., FTC v. Diversified Mktg. Servs. Corp.*, No. 1:96-CV-615-FM. (W.D. Okla. filed Mar. 12, 1996); FTC v. Windward Mktg., No. 1:9 6-CV-615-FM. (N.D. Ga. filed May 26, 1996); *FTC v. S.J.A. Soc'y*, No. X97 0061 (E.D. Va. filed May 1997).

[464] *See* discussion and note 400 above of § 310.4 generally, and 67 FR at 4511, regarding the Commission's determination that, in specifying practices as abusive when they do not directly implicate the privacy concerns embodied in the Telemarketing Act, it will demand that the practice meet the criteria for unfairness codified in § 5(n) of the FTC Act, 15 U.S.C. 45(n).

[465] Section 310.3(a)(4) specifies that it is a deceptive practice to make "a false or misleading statement to induce any person to pay for goods or services."

submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. This prohibition is not limited to instances of unauthorized charges resulting from preacquired account telemarketing. Rather, this provision is applicable whenever a seller or telemarketer subject to the Rule causes a charge to be submitted against a customer's or donor's account without obtaining the customer's or donor's express informed consent to do so. This broader prohibition on unauthorized billing is supported by the Commission's extensive law enforcement record of instances of unauthorized billing in telemarketing transactions.

Section 310.4(a)(6) also specifies that, in every transaction, the seller or telemarketer must obtain the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account. "Express" consent means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent.[466] Consent is "informed" only when customers or donors have received all required material disclosures under the Rule, and can thereby gain a clear understanding that they will be charged, and of the payment mechanism that will be used to effect the charge. Of course, the best evidence of "consent" is consumers' affirmatively stating that they do agree to purchase the goods or services (or make the donation), identifying the account they have selected to make the purchase, and providing part or all of that account number to the seller or telemarketer for payment purposes (not for purposes of "identification," or to prove "eligibility" for a prize or offer, for example). But in most instances, the Commission leaves it up to sellers to determine what procedures to employ in order to meet the

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466 *See* Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy—consent.html ("ERA Guidelines").

requirement for obtaining express informed consent. As explained below, however, in certain particularly problematic scenarios, the Commission does impose specific procedures.

Having treated the overall problem of unauthorized billing in new § 310.4(a)(6), the Commission has included additional subsections to address problems particularly associated with preacquired account telemarketing. As noted in the NPRM, evidence shows that, at least to date, unquestionably the greatest risk of harm (*i.e.*, unauthorized charges) to consumers is associated with telemarketing involving the combination of preacquired account information with an offer involving a "free-to-pay conversion."[467] NAAG describes the "free-to-pay conversion" offer (which it refers to as an "opt-out free trial" offer) as the "constant companion" of the preacquired account telemarketer in state law enforcement efforts to date.[468] Indeed, as of the date of this notice, all of

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[467] The Commission has inserted a definition of "free-to-pay conversion" at § 310.2(o) of the amended Rule, which states that "free-to-pay conversion" means: "in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." *See* discussion of § 310.2(o) above.

[468] NAAG-NPRM at 32. Accord AARP-NPRM at 6. CCC attempted to counter this finding by presenting the results of a survey, conducted on behalf of MemberWorks, in April of 2001 by the Luntz Research Companies (the "Luntz Survey"). CCC-NPRM at 10; June 2002 Tr. II at 127; MemberWorks-Supp. passim. In the survey, the caller told the consumer that the caller would read an offer, and would ask for the consumer's reaction. So, it was clear to the consumer that he or she was not buying anything, and instead that the consumer should listen carefully to the terms of the offer so that he or she could answer the caller's questions. Then, the caller read a script involving a "free-to-pay conversion" feature (the script was not submitted with the survey results for the public record). The caller then asked several questions about what the consumer just heard. CCC argued that the results of this survey showed that 85 percent of the respondents said the billing methods were

the law enforcement actions taken by the Commission and by the states that involved telemarketing using preacquired account information also involved an offer with a "free-to-pay conversion" feature.[469]

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understandable, and that the seller was acting fairly. CCC-NPRM at 10. Examination of the Luntz survey in greater detail suggests that the survey does little to support these assertions. First, in fact, none of the respondents said that the billing methods were understandable. According to the survey, 52 percent of the respondents said the billing methods were "mostly" understandable, while 33 percent said they were "somewhat" understandable, and 13 percent said they were not understandable. This means that at least 46 percent of the respondents did not even "mostly" understand the way in which they would be billed after listening carefully to a sales offer involving preacquired account information and a "free-to-pay conversion" feature. *See* MemberWorks-Supp. at 1. In addition, after asking whether the billing methods were understandable, the callers asked two questions structured in ways that strongly suggested the desired result: first they asked, "And if you *agree to join*, and receive a welcome kit with all of the rules in writing, who is responsible *if you forget to cancel* and are billed," then "*If the company tells you three times on the telephone call and then tells you twice in writing that you can cancel* your program membership anytime, but if you don't cancel, you will be charged, is the company acting fairly or not." *Id.* (emphasis added). Moreover, regardless of the merits of the survey results, they do little to offset the extensive evidence of consumer injury from this practice, the continuing flow of complaints into the offices of consumer groups and law enforcement officials at both the state and federal levels, and the AARP survey evidence of consumer perceptions and opinions about preacquired account telemarketing. *See* notes 424-25 and 449 above.

[469] For example, MemberWorks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota) (primarily "free-to-pay conversion" membership clubs); BrandDirect Mktg. Corp. (Assurances of Discontinuance with the States of Connecticut and Washington) ("free-to-pay conversion" membership clubs); Cendant Membership Servs. (Consent Judgment with State of Wisconsin) (same); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York) (same); Damark Int'l, Inc. (Assurances of Discontinuance with States of Minnesota and New York) ("free-to-pay conversion" buyers club); *Illinois v. Blitz Media,*

It is noteworthy that the coupling of preacquired account information with a "free-to-pay conversion" offer is not limited to outbound telephone calls. In *FTC v. Smolev*,[470] for example, the defendants were alleged to have lured consumers to call by offering an inexpensive lighting product in general media advertisements, obtaining account information from the consumer in the initial transaction, and then upselling a "free-to-pay conversion" buyers club membership.[471] In fact, the majority of companies that have been targeted by state or FTC law enforcement action market their "free-to-pay conversion" products or services via upsells, sometimes exclusively, and other times also using outbound telephone calls.[472]

Inc., No. 2001-CH-592 (Sangamon County) ("free-to-pay conversion" membership club); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance) ("free-to-pay conversion" magazine subscription); Triad Discount Buying Service (sued by 29 states and the Commission) ("free-to-pay conversion" membership clubs); *Minnesota v. U.S. Bancorp*, Inc., No. 99-872 (Consent Judgment, D. Minn) (account information provider to seller/telemarketer of "free-to-pay conversion" membership/buyers clubs); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (same, plus insurance packages); *FTC v. Technobrands, Inc.*; No. 3:02-cv-00086 (E.D. Va. 2002) ("free-to-pay conversion" membership clubs); *U.S. v. Prochnow*, No. 1:02-cv-917-JLF (N.D. Ga. 2002) (inbound calls from direct mail solicitations, upsold "free-to-pay conversion" membership clubs).

[470] (a/k/a Triad Disc. Buying Serv.) No. 01-8922 CIV ZLOCH (S.D. Fla. 2001).

[471] Thus, the assertion of some commenters that "the potential for abuse or confusion as to where the [account] information was obtained does not exist in upsells," see, e.g., ANA-NPRM at 6, is not supported by the record, at least in the context of offers with a "free-to-pay conversion" feature, as was the case in *Smolev*.

[472] Unfortunately, the argument made by several commenters that the abusive use of preacquired account information is limited to a discrete number of bad actors (see ATA-NPRM at 19; ERA-NPRM at 16; MPA-NPRM at 23-24) is not supported by the record. Law enforcement actions

Consequently, the Commission has determined that in any transaction involving both preacquired account information and a "free-to-pay conversion," the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted.[473] Specifically, § 310.4(a)(6)(i) provides that a seller or telemarketer making an offer involving both pre-acquired account information and a "free-to-pay conversion" must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits; and (3) make and maintain an audio recording of the entire telemarketing transaction. Thus, in every instance where the combination of preacquired account information and "free-to-pay conversion" is involved in a telemarketing transaction, the customer must be required to reach into his or her wallet, and provide at least a portion of the account number to be charged.[474] It must be clear that the customer is providing that

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alleging injuries caused by abuses of preacquired account telemarketing have been brought against well-known, national companies and financial institutions, including but not limited to: U.S. Bancorp, Fleet Mortgage Corporation, MemberWorks, Ticketmaster, and Time. *See* NAAG-NPRM at 30, n.73.

[473] NAAG recommended prohibiting the use of preacquired account information, even if that information was previously obtained by the same seller or telemarketer from the consumer, in solicitations involving a "free-to-pay conversion" feature. NAAG-NPRM at 39. The Commission declines to adopt this recommendation at this time, and is confident that the solution adopted will provide consumers the information and command over these transactions they need to protect themselves from unauthorized charges.

[474] *See* note 449 above. Moreover, industry's argument that there is no evidence of problems where there is a transfer of account information ["after consent" is belied by the record of law enforcement actions in this area. *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla.

account number to authorize a purchase. This means that, at a minimum, the disclosures required in § 310.3(a)(1) in general, and also § 310.3(a)(1)(vii) in particular, must be provided to the customer before the customer provides express informed consent—which, in the case of preacquired account telemarketing and a "free-to-pay conversion" feature, means before the customer provides account information and express agreement to be charged for the goods or services on the account provided. It must also be clear that the customer agrees that the charge be placed on the account whose digits the customer provided. The Commission expects that, to comply with this requirement, the seller or telemarketer shall expressly identify the account to be charged, and inform the customer that it possesses the customer's account number already, or has the ability to charge that account without obtaining the full account number from the customer.

Finally, the Commission is requiring that the entire sales transaction be recorded. The record evidence shows that it is not adequate in offers involving both preacquired account information and "free-to-pay conversions" to record a portion of the call that allegedly includes some or all of the required disclosures regarding cost and payment.[475] Often, what law enforcement efforts have gleaned is that the necessary disclosures are grouped together during the "verification" process, at the end of a lengthy telemarketing pitch during which consumers are led to reasonably believe that they are not committing to a purchase. As one commenter explained:

> [C]onsumers are led to believe that they are agreeing to accept materials in the mail, preview a program along

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2001). In fact, in virtually all of the state and federal law enforcement actions in this area, consumers stated that they did not recognize the billing entity or understand how that seller obtained their account information. *See* notes 450-51 above.

[475] NAAG-NPRM at 32-33 (discussing ineffectiveness of verification).

> with a free gift, or the like. As one telemarketer explicitly stated in its scripts: 'we're sending you the information through the mail, so you don't have to make a decision over the phone.' Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer's preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. . . . Preacquired account telemarketing verification taping typically is preceded by statements suggesting that the taping is 'to prevent clerical error' and critical information is revealed in ways that many consumers will not grasp at the end of a conversation.[476]

Thus, not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining that the consumer's consent is both express and informed. Moreover, consumers' confusion about the nature of "free-to-pay conversion" offers—particularly in the context of preacquired account telemarketing—is evidenced by the steady stream of complaints, as well as evidence uncovered in law enforcement actions by the states.[477] Further, the record contains compelling evidence of cancellation patterns for membership programs offered on a "free-to-pay conversion" basis in preacquired account telemarketing transactions. As explained by the Minnesota Attorney General,

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[476] *Id.*

[477] *See* Illinois-NPRM at 2 (In Illinois' lawsuit against Blitz Media, Inc., the attorney general initially received 146 consumer complaints. After initiating the litigation, the Illinois attorney general found that approximately 45,000 Illinois consumers had been enrolled in Blitz Media's buyers club, but only about 8,000 of them remain "active" members of the buyers club, since the rest had discovered these charges and cancelled the membership, or initiated a chargeback, claiming the charge was unauthorized.).

> [c]onsumers canceling within the 30-day free trial period likely indicate that [they] understood (either during the phone call or with the follow-up material or both) the terms of the deal. If all consumers understood the free trial offer, one would expect to see a significant cancellation rate within the 30 day free trial offer period followed by a scattered pattern of later cancellations. The data we have reviewed [from two financial institutions of cancellation dates relative to date of enrollment for Minnesota consumers charged by the institutions as a result of preacquired account telemarketing transactions involving a "free-to-pay conversion"] suggest this is not the typical pattern. . . . The overall pattern of [the data from each institution] is strikingly similar. The largest concentration of cancellations occurs immediately after the free trial period but coincident with the first account charge for the service. The cancellation rate in the free trial period is less than half the cancellation rate in the 31-90 day period, when consumers have been billed for the service. This result is consistent with the pattern of consumer complaints alleging unauthorized charges received by Attorneys General and with the data suggesting that most consumers cancel these charges because they believe they are unauthorized.[478]

Consequently, to ensure that the consent provided by the consumer is not only "express" but is also "informed" in this limited, but problematic, context of "free-to-pay conversion" features in preacquired account telemarketing offers, the amended Rule requires that an audio recording of the entire transaction, from start to finish, be created and maintained. A

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[478] Minnesota-Supp. at 4-5. One industry commenter submitted the results of a telephone survey, which it asserted showed that consumers do, in fact, understand the terms of these "free-to-pay conversion" features. *See* note 469 above. The data received in litigation from the institutions participating in these telemarketing campaigns, however, belies the purported conclusions of this survey. *See* note 457 above.

handful of commenters argued that such audio recording would be prohibitively expensive, particularly in the inbound context, where some sellers and telemarketers have not traditionally recorded the telemarketing calls.[479] Given the narrow category of calls to which this requirement applies, and the rapidly growing use of inexpensive and efficient digital audio recording technology,[480] the Commission believes that this requirement will not pose a significant burden to sellers and telemarketers who freely choose to market their goods or services using a "free-to-pay conversion" feature and preacquired account information. Moreover, the record is compelling that any incremental costs to industry of these requirements are likely outweighed by the benefit to consumers of curtailing the practice as it is currently employed in the marketplace.

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[479] ERA/PMA-Supp. at 3, 7 ("We understand from certain of our members that imposing the record keeping requirement[s] on inbound [upsells] may require substantial investments of money and resources to develop the systems necessary to comply with these requirements.").

[480] *See* generally Contract Digital Recorder, by Data-Tel Info Solutions, at http://www.datatel-info.com/digicorder.html (describing affordable digital recording system for telemarketing operations); Veritape Call Centre-Case Study 2, at http://www.veritape.com/veritape/vtcccase.htm (describing a US call center that saved $70,000 annually by switching from analog taping process to digital recording); Ron Elwell, *Streamlining Call Center Operations*, Teleprofessional, Sept. 1998, at 130-34 (discussing "how CTI-enabled digital recording technology is helping call centers of all types be more productive and profitable"); Teleprofessional, Inc., *CCPN's System Owner Shootout*, CALL CENTER PRODUCT NEWS, Fall 1998, at 52-54, 56 (explanations by several telemarketers' systems professionals of savings and efficiencies experienced using improved digital recording and monitoring systems); Michael Binder, *The Evolution of Digital Recording in the Call Center*, TELEMARKETING & CALL CENTER SOLUTIONS, Nov. 1997, at 38. *Cf.* Duncan Furness, Choosing a Tape Technology, COMPUTER TECHNOLOGY REVIEW, Nov. 2000, at 40.

In addition to the requirements noted above, in any telemarketing transaction involving preacquired account information (but not a "free-to-pay conversion" feature), § 310.4(a)(6)(ii) specifically requires that the seller or telemarketer (1) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged, and (2) obtain from the customer or donor his or her express agreement to be charged for the goods or services *and* to be charged using the account number identified during the transaction. Again, the Commission intends this to mean that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the customer.

The Commission has taken a targeted approach in the amended Rule, focusing on the tangible harm caused by the practices identified as problematic in the rulemaking proceeding. It bears noting, however, that the Commission recognizes preacquired account telemarketing as an emerging practice, one that will receive close attention from the Commission, and, no doubt, the state Attorneys General. The Commission wishes to emphasize that, particularly in transactions involving "free-to-pay conversion" offers, so long as preacquired account information is involved, there exists that fundamental shift in the bargaining relationship discussed above, and therefore potential for abuse.[481] While the Commission is confident that the majority of industry members will abide by the new provisions, and that doing so will provide consumers the information and control needed to shield them from the abuses encountered in the past with these transactions, it also notes that the best practice in such circumstances is to ensure that the seller or telemarketer does

[481] NAAG-NPRM at 30; Covington-Supp. at 4-5.

not have the ability to cause a charge to a consumer's account without getting the account number from the consumer herself. This practice would, in effect, be self-enforcing, as the control over the transaction (absent misrepresentations by the telemarketer) would truly be with the consumer, where it belongs. Should it become apparent that the remedies imposed by the amended Rule are insufficient, or that preacquired account telemarketing practices have evolved further in such a way as to cause additional harm to consumers, the Commission will not hesitate to revisit its approach to the practice and revise the Rule accordingly.

Other Recommendations

Other than those commenters who suggested deleting the prohibition entirely,[482] industry commenters' primary recommenddation was to substitute the express verifiable authorization provision of § 310.3(a)(3), or some variation on a disclosure and "consent" requirement,[483] for the proposed blanket prohibition on the transfer of billing information.[484] The general theme was that disclosures and "consent" were sufficient to remedy the harm being caused consumers by the misuse of preacquired account information. It is unclear what these commenters mean by "consent" in this context, as they also recommended that sellers and telemarketers be permitted

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[482] ABA-NPRM at 8-9; ABIA-NPRM at 4; CMC-NPRM at 9-10; MBNA-NPRM at 6.

[483] *See, e.g.*, DMA-NPRM at 39-40 (specific to upselling) (the Commission "should instead require that notice of transfer of billing information be disclosed to the consumer and that consent be given by the consumer prior to the transfer").

[484] *See* ATA-NPRM at 20; ATA-Supp. at 5-6; CCC-NPRM at 11-12; ERA-NPRM at 24-25; ERA/PMA-Supp. at 11-15; ITC-NPRM at 5; MPA-NPRM at 26-29; MPA-Supp. at 5-6; NATN-NPRM at 3 (Supporting ERA Guidelines and recommendation); Noble-NPRM at 3 (same); NSDI-NPRM at 3 (same); PMA-NPRM at 19 (same). *See* also Associations-Supp. at 6.

to use any of the three existing avenues for achieving express verifiable authorization, including providing consumers a written confirmation after terminating the telephone call. In the context of "free-to-pay conversions," the record shows, in no uncertain terms, that disclosures are not sufficient to prevent widespread consumer injury.[485] Most sellers and telemarketers have been telling consumers at some point in the conversation, in greater or lesser detail, that they will be charged at some point for the goods or services being offered on a "free-to-pay conversion" basis; but, as noted above, these disclosures come late in the conversation, and do not resonate with consumers who understand "free" to mean "free" and that to obligate oneself to purchase something, the buyer must provide a payment mechanism to the seller.[486] Often, these disclosures come in writing in a "membership package" sent to the consumer some time after the call. Law enforcement experience has shown that these disclosures are meaningless to consumers—who either never receive the packets, or assume they are junk mail and discard them.[487] Moreover, in any telemarketing transaction, but most especially in preacquired account telemarketing, it is imperative that the seller or telemarketer ensure that the consumer actively, and unequivocally, provides his or her consent to be charged, and to be charged using a particular

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[485] Review of taped verifications obtained as evidence in the Commission's law enforcement actions and in similar state actions convincingly demonstrates the inadequacy of disclosures in this context.

[486] *See* NCL-NPRM at 7 ("Merely requiring telemarketers to disclose that they have already obtained the billing account information from another source or that they may share that information with other marketers would not provide consumers with adequate protection from abuse. Express verifiable authorization to use the billing account information is not enough in these instances because it comes into play after the fact; it does not give consumers prior knowledge of or control over who has their account information.").

[487] *See* discussion of § 310.3(a)(3)(iii) above.

payment mechanism. The Commission has determined, therefore, that prohibiting unauthorized charges, and laying out what is required to obtain express informed consent in certain circumstances, is the most appropriate solution not only to the harm caused by preacquired account telemarketing abuses, but also by other exploitative billing methods in telemarketing.

§ 310.4(a)(7)—Failing to transmit caller identification information

Section 310.4(a)(7) of the amended Rule addresses transmission of caller identification ("Caller ID") information. This section prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call." A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. Full compliance with the Caller ID provision will be required by January 29, 2004.

The record includes several key principles supporting the Commission's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.[488] Fourth, consumers and telemarketers will

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[488] EPIC-NPRM at 11-12.

both benefit from the increased accountability in telemarketing that will result from this provision.[489] Fifth, law enforcement groups will benefit from a vital new resource from the required transmission of Caller ID information in telemarketing.[490]

Background. The original Rule did not address the issue of Caller ID, or the feasibility or desirability of requiring telemarketers to transmit Caller ID information. During the Rule Review, however, the Commission received numerous comments from consumers and others expressing frustration about telemarketers' routine failure to transmit Caller ID information.[491] Commenters complained that when telemarketers called, consumers' Caller ID devices would show a phrase like "unknown," "out of area," or "unavailable," instead of displaying the name and telephone number of the telemarketer or seller on whose behalf the call was made.[492] Based on the Rule Review record, the Commission proposed in the NPRM to prohibit blocking, circumventing, or altering the transmission of Caller ID information.[493]

In support of this proposal, the Commission discussed in the NPRM the benefits that accrue to consumers from transmission of Caller ID information and the technical

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[489] Make-A-Wish-NPRM at 6; Associations-Supp. at 7; DialAmerica-Supp. at 2.

[490] Make-A-Wish-NPRM at 6; McClure-NPRM at 2; NACAA-NPRM at 9; NYSCPB-NPRM at 4; Patrick-NPRM at 2-3; TRA-NPRM at 11.

[491] *See, e.g.*, Baressi-RR at 1; Bell Atlantic-RR at 8; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[492] *See, e.g.*, Baressi-RR at 1; Blake-RR at 1; Collison-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

[493] The Caller ID provision is found at § 310.4(a)(7) of the proposed Rule; discussion of the proposed Rule provision is found at 67 FR at 4514-16.

considerations implicated by transmission of this information.[494] Consumers benefit because Caller ID information allows them to screen out unwanted callers and identify companies that have contacted them so that they can place "do not call" requests to those companies. These features of Caller ID enable consumers to protect their privacy and are clearly within the ambit of the Telemarketing Act's mandate, set forth in 15 U.S.C. § 6302(a)(3)(A), to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of their right to privacy.[495] The fact that consumers greatly value the privacy protection provided by receipt of Caller ID information is evidenced by the fact that, as of the year 2000, nearly half of all Americans subscribed to a Caller ID service.[496]

The Commission noted in the NPRM the conflict in opinion during the Rule Review regarding the feasibility of requiring Caller ID transmission by telemarketers.[497] Based on its assessment of the information on the record at the close of the Rule Review, the Commission expressed its uncertainty that telemarketers using "T-1" trunk lines could transmit Caller ID information, and the Commission therefore

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[494] 67 FR at 4514-16. The Commission also asked whether trends in telecommunications might one day permit the transmission of full Caller ID information when the caller uses a trunk line or PBX system. *Id.* at 4538.

[495] 67 FR at 4514. DMA argued that the Commission lacks authority to require Caller ID transmission. DMA-NPRM at 48-49. However, the NPRM clearly explains that the harm to consumers that arises from failure to transmit Caller ID information falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. 67 FR at 4514-16. The Commission therefore rejects DMA's "lack of authority" argument.

[496] Dina ElBoghdady, Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes, WASH. POST, Sept. 8, 2002, at H 2.

[497] 67 FR at 4515.

did not at that time propose to mandate such transmission.[498] The NPRM also acknowledged telemarketers' argument that, even if they could transmit Caller ID information, they would still face the challenge of transmitting a number that would be useful to consumers.[499]

The Commission received numerous comments in response to the NPRM's discussion of Caller ID. Some industry representatives simply posited that transmission of Caller ID information was not possible, or argued that it was possible to transmit a telephone number, but that it was impossible or prohibitively expensive to transmit a telephone number that consumers could use to call the telemarketer that had called them.[500] Consumer groups and law enforcement representtatives urged the Commission not to accept telemarketers' claims that mandatory Caller ID transmission is impossible or prohibitively expensive without carefully examining the technical considerations involved.[501] A number of consumers expressed frustration with telemarketers who fail to transmit Caller ID information.[502]

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[498] *Id.*

[499] *Id.* Some telemarketers asserted that the telephone number that would likely be displayed on consumers' Caller ID services would be the telemarketer's central switchboard or trunk exchange, rather than a customer service number or a number where consumers could submit a "do not call" request.

[500] ANA-NPRM at 6; Associations-NPRM at 3; DMA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 25; Synergy Solutions-NPRM at 3-4; Teledirect-NPRM at 3; Associations-Supp. at 7. *See* also AFSA-NPRM at 19; Assurant-NPRM at 6. But *see* EPIC-NPRM at 11, 13; NAAG-NPRM at 45.

[501] EPIC-NPRM at 11-12; NAAG-NPRM at 45; AARP-NPRM at 5-6.

[502] *See, e.g.*, Robert Hawrylak (Msg. 3382); Carl Wallander (Msg. 861); George Kapnas (Msg. 2243); Tom Kaufmann (Msg. 2433); Bob Schmitt (Msg. 3494); Bradley Davis (Msg. 3890); Toryface (Msg. 19744). In all, more than 200 consumers stated that the Commission's proposed

Industry commenters generally supported the proposed prohibition on blocking Caller ID, but urged the Commission not to require Caller ID transmission,[503] although one telemarketer very strongly advocated that the Commission do so in order to remove the cloak of anonymity from telemarketers and thus promote accountability for the greater benefit of the industry as a whole.[504] A number of industry commenters wanted to make sure that "the prohibited practice is the deliberate manipulation of the Caller-ID signal" and that "[a]s long as no overt actions are taken to disrupt the information, there is no violation."[505] Several commenters expressly urged that purchasing or using telephone equipment that lacks Caller ID functionality should not be a violation of the Rule.[506]

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approach in the NPRM was not adequate to protect consumers' right to privacy.

[503] ABA-NPRM at 9; ARDA-NPRM at 6; ANA-NPRM at 6; Associations-NPRM at 3; BofA-NPRM at 7; CBA-NPRM at 10; Comcast-NPRM at 4; DMA-NPRM at 48; ERA-NPRM at 48-49; Green Mountain-NPRM at 27; ITC-NPRM at 3; Lenox-NPRM at 6; MPA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 24-25; Synergy Solutions-NPRM at 3-4; Tribune-NPRM at 10; VISA-NPRM at 13. In the NPRM, the Commission specifically asked, among other things, whether it would "be desirable to propose a date in the future by which all telemarketers would be required to transmit Caller ID information." 67 FR at 4538.

[504] DialAmerica-NPRM at 24; DialAmerica-Supp. at 10; June 2002 Tr. II at 83 (DialAmerica).

[505] Synergy Solutions-NPRM at 3. *See* also Nextel-NPRM at 25; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; ITC-NPRM at 3.

[506] AFSA-NPRM at 19; Comcast-NPRM at 4; CBA-NPRM at 10; Cox-NPRM at 37; Household Bank-NPRM at 16; Nextel-NPRM at 25; Thayer-NPRM at 5; Wells Fargo-NPRM at 3. But *see* EPIC-NPRM at 11, 13-14; McClure-NPRM at 1; Patrick-NPRM at 2-3; Thayer-NPRM at 5 (Commenter raises issue of whether Internet telephony users could transmit Caller ID information. There is nothing in the record indicating

Technical feasibility of mandatory transmission of Caller ID information. The rulemaking record as a whole shows that telemarketers' failure to transmit Caller ID information need not be the result of their blocking its transmission or some other affirmative measure on their part.[507] Rather, the record indicates that non-transmission of Caller ID information may be a by-product of purchasing or using telephone equipment that lacks Caller ID transmission functionality.[508]

In concluding that required transmission of Caller ID information is technically feasible and not costly for telemarketers, the Commission was persuaded in part by the example provided by DialAmerica. In its written comments and at the June 2002 Forum, DialAmerica explained how it transmits Caller ID information to the consumers it calls.[509] DialAmerica's carrier assigns a telephone number to each of DialAmerica's call centers. When a sales representative from

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that telemarketers use Internet telephony. If they do use such technology, they are reminded that all telemarketers subject to the Rule must transmit Caller ID information. The FTC's own telephone system uses IP telephones, which do provide Caller ID information.).

[507] ATA-Supp. at 16-17; Chicago ADM-NPRM at 1; Lenox-NPRM at 6; NRF-NPRM at 19.

[508] EPIC-NPRM at 11; TRA-NPRM at 11. As is discussed below, non-transmission may also result from errors in telephone companies' equipment.

[509] DialAmerica-Supp., Att. A at 1-2. *See* also June 2002 Tr. II at 81-83. According to one of DialAmerica's written comments: "Caller ID information can be delivered over T-1's today. We have been doing it for over two years. If the Commission does not mandate the delivery of Caller ID information, those who would want the Commission to believe that it cannot be done will have been successful." DialAmerica-Supp. at 10. *See* also DialAmerica-NPRM at 25 ("The conclusion stated in the NPRM . . . that trunk or T-1 lines will only display a term like "unavailable" is not correct.") and NAAG-NPRM at 45 ("We have been advised that all trunk lines . . . should be capable of supporting Caller ID.")

a particular call center calls a consumer, that call center's assigned telephone number is transmitted to the consumer's Caller ID service. SBC, a large provider of common carriage services, provided support for the availability of DialAmerica's model.[510] DialAmerica stated at the June 2002 Forum that it does not pay its carrier any extra amount to transmit this assigned telephone number to consumers.[511]

The Commission believes the argument by telemarketers that required transmission of Caller ID information would be impossible or prohibitively expensive is based substantially on an erroneous supposition that telemarketers would be required to transmit the specific telephone number from which a sales representative placed a given call. The Commission's citation to DialAmerica's approach should make it clear that the Commission is not requiring this level of specificity. Under the amended Rule's Caller ID provision, telemarketers may transmit any number associated with the telemarketer that allows the called consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, or a number used by the telemarketer's carrier to bill the telemarketer for a given call. In the alternative, a telemarketer may transmit the seller's customer service number or the charitable organization's donor service number, provided that this number is answered during regular business hours.

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[510] *See* SBC-Supp. at 8-10; June 2002 Tr. II at 80-83. *See* also Cox-NPRM at 37; DMA-NPRM at 49; Green Mountain-NPRM at 28; Associations-Supp. at 7.

[511] June 2002 Tr. II at 83 (DialAmerica). Moreover, other moderate-sized telemarketers reported that they currently transmit Caller ID information. Because they are not compelled to do this, the Commission believes that doing so is not cost-prohibitive. *See* Aegis-NPRM at 5; Lenox-NPRM at 6. *See* also ANA-NPRM at 6; ARDA-NPRM at 6 But *see* ATA-Supp. at 18.

Not every telemarketer will need to follow DialAmerica's approach for transmission of Caller ID information. The record reflects various options in calling equipment used by telemarketers.[512] A telemarketer's choice of calling equipment is determined in part by the telemarketer's size. The smallest telemarketers, most likely placing calls from home, may contact consumers using a "plain old telephone service" ("POTS") line. A telemarketer calling consumers with a POTS line will have no difficulty transmitting Caller ID information.[513] This is also true if, to call consumers, the telemarketer uses Integrated Services Digital Network-Basic Rate Interface ("ISDN-BRI") technology, which, like POTS lines, is likely to be utilized only by the smallest telemarketers.[514]

Larger telemarketers commonly use a "private branch exchange" switch ("PBX"), which enables them to place large volumes of calls more efficiently.[515] For telemarketers

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[512] *See, e.g.*, Nextel-NPRM at 25 (proprietary dialers); DialAmerica-Supp., Att. A at 1 (regular trunk groups provisioned by carrier); Fiber Clean-NPRM at 1 (telemarketers working from home).

[513] SBC-Supp. at 8.

[514] http://www.bell-labs.com/technology/access/ISDN-BRI.html. ISDN -BRI essentially uses a caller's existing wiring to transmit calls digitally. As such, its capability to transmit Caller ID information is akin to a POTS line's capability.

[515] FN515 SBC-Supp. at 8-9. This is also true of telemarketers using predictive dialers. Predictive dialers used by many telemarketers contain features similar to a PBX, and the capacity of such a predictive dialer to transmit Caller ID information is essentially the same as the capacity of a PBX to do so. *See, e.g.*, Sytel-NPRM at 8 (arguing that telemarketers using predictive dialers should transmit Caller ID information. This comment suggests that predictive dialers are capable of transmitting Caller ID information). *See* also http://www.pbxinfo.com/portal/ modules.php? op =modload&name=Sections&file-=index&req=viewarticle&artid=8.

using a PBX, the primary determinant in transmitting Caller ID information is the telemarketer's connection to its telephone company. A telemarketer using a PBX connects to its telephone company through a "trunk."[516] The more modern type of trunk used in telemarketing is an "Integrated Services Digital Network-Primary Rate Interface" ("ISDN-PRI") trunk.[517] It is clear from the record that a telemarketer using such an "ISDN-PRI" trunk has no difficulty in transmitting Caller ID information to a consumer.[518]

The older kind of trunk used in telemarketing is a "T-1" trunk.[519] Telemarketers using a "T-1" trunk are perhaps most likely to follow DialAmerica's model by having their carriers assign a telephone number to the trunk for transmission to consumers' Caller ID services. This is true because, in contrast to "ISDN-PRI" trunks, "T-1" trunks do not routinely transmit the caller's telephone number to Caller ID devices.[520] Some telemarketers stated that it may be technically feasible (but costly) for them to upgrade, reconfigure, or replace their PBX switches or their "T-1"

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[516] SBC-Supp. at 8-9. An alternative to PBX available to telemarketers (but not widely used) is called "Centrex." Telemarketers using Centrex connect to their telephone company using a telephone line; telemarketers using a PBX connect to their telephone company using a trunk. Because Centrex users use a line rather than a trunk, telemarketers using Centrex (like telemarketers using a POTS line or ISDN-BRI) should not find it difficult to transmit Caller ID information. *See* http:// www.granitestatetelephone.com/sfb—centrex.html.

[517] June 2002 Tr. II at 76-77 (SBC).

[518] EPIC-NPRM at 12; SBC-Supp. at 8-9; June 2002 Tr. II at 80-81 (SBC).

[519] Some telemarketers may use a "T3" or "DS3" trunk. This kind of trunk is essentially a collection of "T-1" trunks; as such, it operates in a manner similar to a T-1 for purposes of Caller ID functionality. *See* http://www.hal-pc.org/[tilde]ascend/MaxTNT/hwinst/tntt3.htm.

[520] SBC-Supp. at 8-9.

trunks in order to transmit a specific sales representative's telephone number.[521] However, the Commission's approach does not require this level of precision. Consequently, telemarketers will not have to absorb the expense associated with achievement of this level of precision.

Regardless of telemarketers' calling systems and carriers' ability to assign a telephone number to a telemarketer's call center, there are occasions in which Caller ID information does not reach the called consumer even when telemarketers arrange for the transmission of that information.[522] Two situations would seem to be outside the control of the telemarketer. First, the route traveled by a call could pass through a switch that lacks Caller ID functionality, essentially dropping the Caller ID data but forwarding the rest of the call transmission.[523] Second, a malfunction within a carrier's system could result in the failure to transmit Caller ID information in a given call.[524] Because these phenomena are outside the control of the telemarketer, the telemarketer would not be held liable for violating this provision of the Rule when the failure to transmit Caller ID information results from such an occurrence. However, to avoid liability in such a case, a telemarketer must be able to establish that it has taken all available steps to "transmit or cause the transmission of" identifying information. This includes employing technical means within the telemarketer's operation, ensuring that the telemarketer's telephone company is equipped to transmit Caller ID information, and not using any means to block Caller ID transmission.

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[521] Synergy Solutions-NPRM at 4; TeleDirect-NPRM at 3. But *see* EPIC-NPRM at 11-12.

[522] *See, e.g.*, ABA-NPRM at 9; Chicago ADM-NPRM at 1; IMC-NPRM at 9; Lenox-NPRM at 6; Teledirect-NPRM at 3; Associations-Supp. at 7; ATA-Supp. at 17.

[523] ATA-Supp. at 16; SBC-Supp. at 13.

[524] SBC-Supp. at 13.

A very small number of telemarketers may be located in areas of the country that are served only by telephone companies that are not capable of transmitting Caller ID information or assigning a telephone number to the telemarketer that can be transmitted to a called consumer.[525] The Commission does not intend to require such telemarketers to relocate to areas of the country that are served by telephone companies that do provide Caller ID capability. Nonetheless, in enforcing this provision, the Commission would take into account any telemarketer's relocation from an area where it can transmit Caller ID information to a location where it cannot. However, the Commission believes it is unlikely that a telemarketer would go to such lengths in order to avoid compliance with this new requirement.

The Commission recognizes that transmission of Caller ID information does not depend on technical capability alone. Telemarketers who currently possess Caller ID capability may deliberately decline to transmit this information to the consumers they solicit. There is record evidence to support legitimate explanations for deliberate blocking of Caller ID transmission.[526] Fiber Clean, for example, uses telemarketers working from home; it advocates Caller ID blocking to protect its employees' privacy.[527] Other telemarketers may

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[525] The record reflects that with the exception of some small interexchange carriers ("IXCs"), competitive local exchange carriers ("CLECs"), and some incumbent local exchange carriers ("ILECs") serving rural pockets of the country, all telephone companies can pass along Caller ID information. *See* June 2002 Tr. II at 78-79; FCC First Report and Order in the Matter of Access Charge Reform, CC Docket No. 96-262 (May 7, 1997), para. 137; http:// www.ss7.net: Carriers connected to the Signaling System 7 ("SS7") network can transmit Caller ID information. SS7 is the predominant signaling system, and its use is increasing. But *see* Green Mountain-NPRM at 28.

[526] Fiber Clean-NPRM at 1; Cox-NPRM at 37-38; NRF-NPRM at 19. But *see* ERA-NPRM at 48; Teledirect-NPRM at 3; ATA-Supp. at 16.

[527] Fiber Clean-NPRM at 1.

block Caller ID transmission because they are unable to transmit a telephone number which would be useful to consumers.[528]

The Commission has concluded that some flexibility regarding what telephone number and name the telemarketer may transmit best accommodates the current state of telemarketing.[529] A telemarketing service bureau calling on behalf of more than one seller, for example, may benefit from the option of transmitting the seller's name and telephone number rather than its own.[530] Under § 310.4(a)(7), telemarketers have the option of transmitting a telephone number associated with them that enables the consumer to identify who called, or, in the alternative, the seller's customer service number or the charitable organization's donor service number. If the telemarketer transmits its own number, that number ideally should enable the consumer to communicate with the caller to assert a company-specific "do not call" request. Alternatively, telemarketers can forward consumers' return calls to a customer service line.[531] At-home callers with a POTS line cannot alter, but they can acquire a second line

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[528] Cox-NPRM at 37-38; NRF-NPRM at 19.

[529] ARDA-NPRM at 6; Assurant-NPRM at 6; ATA-Supp. at 16; DMA-NPRM at 50; ERA-NPRM at 49; IMC-NPRM at 8; MPA-NPRM at 9, 49-50. *See also* Assurant-NPRM at 6 (Commenter asked that the Rule do more to prevent transmission of misleading Caller ID information. The Commission believes that the amended Rule addresses this concern.). But *see* AARP-NPRM at 6; NCL-NPRM at 8; Patrick-NPRM at 10 (telemarketer should be required to transmit the seller's name whenever possible). *See also* EPIC-NPRM at 12; Make-A-Wish-NPRM at 5-6; Worsham-NPRM at 4 (telemarketer should identify itself rather than the seller). *See also* BellSouth-NPRM at 4-5 (no flexibility in transmitted number should be permitted).

[530] MPA-NPRM at 9; DMA-NPRM at 50. *See also* Green Mountain at 28; ATA-Supp. at 16.

[531] DialAmerica provides a model for the use of call forwarding in this context. *See* DialAmerica-Supp., Att. A at 2.

for business calls, which would allay privacy concerns associated with transmission of the caller's residential number.

Consumers benefit from transmission of Caller ID information. The record, taken as a whole, establishes that it is neither technically nor economically infeasible for telemarketers to transmit Caller ID information. On the other side of the equation, consumers derive substantial benefit from receiving Caller ID information. Moreover, as the Commission explained in the NPRM, the transmission of Caller ID information is necessary to protect consumers' privacy under the Telemarketing Act.[532] Consumers in large numbers subscribe to, and pay for, Caller ID services offered by their telephone companies.[533] Many of these consumers subscribe to Caller ID specifically to identify incoming calls from telemarketers and screen out unwanted telemarketing calls.[534] Indeed, according to Private Citizen, consumers spend an aggregate of $1.4 billion annually on Caller ID services to limit unwanted telemarketing calls.[535] Consumers who commented on the record expressed frustration at the failure of telemarketers to provide Caller ID information.[536]

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[532] 67 FR at 4514.

[533] Dina ElBoghdady, Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes, WASH. POST, Sept. 8, 2002, at H2 (Noting that, according to a survey conducted in 2000, nearly half of all Americans subscribe to caller ID); ACUTA-NPRM at 2.

[534] McClure-NPRM at 3; Private Citizen-NPRM at 2, Susannah Fox (Msg. 3624), CN Rhodine (Msg. 480), Gautham Achar (Msg. 596), Brenda Hall (Msg. 825), Carl Wallander (Msg. 861). *See also* 67 FR at 4515, n.223 (citing Bell Atlantic survey finding that three out of four residential customers buy Caller ID to help stop abusive telephone calls).

[535] Private Citizen-NPRM at 2. *See* also Associated Press, Phone Companies Act as Double Agents in Telemarketing War, CHI. TRIB., Oct. 27, 2002, at C4.

[536] *See, e.g.*, Robert Hawrylak (Msg. 3382), Patricia Frank (Msg. 223), Jo Ann Kilmer (Msg. 530), Jim Kelly (Msg. 541), Carl Wallander (Msg.

These consumers have, over time, come to the conclusion that an incoming call that fails to provide Caller ID information is commonly a telemarketing call.[537] As a result, some consumers decline to answer these calls.[538] In an attempt to protect their privacy from incoming calls with no Caller ID information provided, other consumers have gone beyond call screening with services such as Caller Intercept and Privacy Manager, both of which are offered by telephone companies for a fee, that intercept incoming calls with no Caller ID information and require such callers to identify themselves before their call will be connected.[539] At present, Caller ID services are an ineffective solution from consumers' perspective: many consumers pay added costs simply to find out who is calling them, yet this investment is useless when the identifying information is not made available.[540]

With the exception of Fiber Clean, which argued in favor of allowing at-home telemarketers to block Caller ID transmission, comments from industry members on the whole did not argue that telemarketers have a reason to block Caller ID transmission which might override the substantial privacy

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861), John G. Talafous (Msg. 1236), Louis Sarvary (Msg. 1319), George M. Kapnas (Msg. 2243), Bob Greene (Msg. 2716). FarmGirl16F3 (Msg. 14015).

[537] *See, e.g.*, Karen Peters (Msg. 3814), Chuck Jackson (Msg. 209).

[538] *See, e.g.*, E Pereira (Msg. 214), Brenda Hall (Msg. 825), Victoria Brigman (Msg. 3889).

[539] FN539 *See, e.g.*, http://www22.verizon.com/ForYourHome /SAS/res—fam—identify.asp; Private Citizen-NPRM at 2; DC-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 2.

[540] AARP-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 3. But *see* Lynn Gaubatz (Msg. 2769) (Consumer prefers current state of affairs where "most" telemarketers block transmission of Caller ID information because her Caller ID is programmed to refuse calls from parties who block such transmission. Using this arrangement, the consumer reports receiving few telemarketing calls.).

protection afforded to consumers when their Caller ID service shows them who is calling.[541] To the contrary, comments from industry members supported the privacy principle behind the Rule's Caller ID provision, but took issue with the proposition that they should be required to transmit or cause transmission of Caller ID information.[542] Therefore, there is strong support for the Commission's position that requiring Caller ID transmission in telemarketing calls will help promote consumers' privacy by allowing them to know who is calling them at home.

Transmission of Caller ID information will also promote accountability throughout the industry—a goal championed by consumers[543] and industry members[544] alike. The Commission is persuaded by the argument DialAmerica presented in favor of requiring transmission of Caller ID in telemarketing calls. According to DialAmerica: "[d]elivery of Caller ID information, that will be displayed on a consumer's Caller ID device or that can be accessed through such services as *69, is essential to create accountability in the outbound telemarketing industry."[545]

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[541] Several comments from industry groups asserted that the Commission should yield to the FCC's standard on Caller ID blocking, under which the calling party's ability to block Caller ID transmission is preserved. *See, e.g.*, DMA-NPRM at 48-49; SBC Supp. at 10-11. As is discussed below, however, the concerns at stake in the FCC's regulation—law enforcement and safety—are not implicated by telemarketing calls.

[542] DMA-NPRM at 48; IMC-NPRM at 8.

[543] *See, e.g.*, Teresa Vargas (Msg. 1292) ("I think telemarketers should NOT be able to block their phone numbers on Caller ID screens or *69. This will make the telemarketers more accountable, particularly if their tactics are in violation of a "do-not-call" request or if, [sic] the telemarketers successfully scam consumers."); Lisa Bellanca (Msg. 2007).

[544] *See, e.g.*, DialAmerica-Supp. at 2; June 2002 Tr. II at 91-92 (ERA).

[545] DialAmerica-Supp. at 2.

Commenters noted that the increase in accountability that would accrue from requiring transmission of Caller ID information in telemarketing would provide particular benefit in addressing abandoned calls.[546] Consumers whose privacy has been abused by dead air and call abandonment find it difficult, if not impossible, to ascribe those practices to a particular telemarketer unless Caller ID information is provided.[547] As explained by DialAmerica, mandatory transmission of Caller ID information will provide "a strong incentive for companies to keep abandonment rates low and eliminate 'dead air,'" as these companies do not want to engage in practices that might encourage consumers to invoke their company-specific "do-not-call" rights.[548]

The enhanced accountability provided by Caller ID transmission extends beyond complaints about call abandonment and dead air. Caller ID information provides a record of identification that endures beyond the telemarketing call. The prompt disclosures required by 310.4(d) provide consumers with a needed introduction to a solicitation call, but do not provide an enduring record of identifying information, as most consumers do not answer the phone with pen and paper at the ready to write down the name of the calling party. Moreover, just as industry comments did not dispute the privacy protections provided by Caller ID transmission, neither did they present a rebuttal to the argument that such transmission will promote accountability in telemarketing. Indeed, the large majority of telemarketers—entities built upon good business practices and compliance with the Rule—will benefit from a provision

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[546] DialAmerica-NPRM at 25; Sytel-NPRM at 8; AARP-NPRM at 9; ARDA-NPRM at 15.

[547] http://www.opc-marketing.com/predictive.htm ("[I]t is assumed that abandoned calls to anonymous consumers do not harm the call center's business.").

[548] DialAmerica-Supp. at 3.

designed to respond to deceptive and abusive practices aided by anonymity in telemarketing.[549]

By eliminating anonymity in telemarketing, the Caller ID provision will serve a third, equally important goal: it will provide law enforcement with a significant new resource.[550] In the years following promulgation of the original Rule, the Commission and the states have created a substantial record of enforcement.[551] However, enforcement efforts concerning some Rule provisions have been frustrated because of difficulty in identifying violators.[552] Sellers and telemarketers that have failed to honor "do-not-call" requests have been particularly hard to identify.[553] A number of comments in the record noted the need for greater ability to identify possible violators, and the advantages of Caller ID information in filling that need.[554] AARP noted that required transmission of Caller ID information will also enable consumers to contact government agencies and the Better Business Bureau to verify the legitimacy of the telemarketer, which will help to prevent fraud before it occurs.[555] Therefore, the transmission of Caller ID information likely will aid law enforcement's ability to enforce the TSR, and increase the Rule's effectiveness.

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[549] *See, e.g.*, AARP-NPRM at 6.

[550] TRA-NPRM at 11; EPIC-NPRM at 11-12.

[551] FTC law enforcement actions alone total over 139 cases, resulting in total judgments of over $200 million since the Rule's inception.

[552] June 2002 Tr. II at 21.

[553] Donald Munson (Msg. 25516); EPIC-NPRM at 11; NYSCPB-NPRM Att. A at 4-5.

[554] DialAmerica-NPRM at 25-26; EPIC-NPRM at 11-12; Patrick-NPRM at 2-3; TRA-NPRM at 11; CN Rhodine (Msg. 480); Charles Goodwin (Msg. 2079); Donald Munson (Msg. 25516).

[555] AARP-NPRM at 6.

Consistency with FCC regulations. FCC regulations require carriers using SS7[556] to provide a mechanism by which a line subscriber can block the display of his or her telephone number on a Caller ID device.[557] SBC referenced the FCC's approach to Caller ID blocking to argue that calling parties' interest in privacy "outweighs the general usefulness of Caller ID service."[558] As the NPRM made clear, the FCC's requirement that common carriers be able to allow Caller ID blocking is meant to address specific calling situations in which protecting the calling party's privacy takes on particular urgency.[559] Cited examples include undercover law enforcement operations and calls placed from battered women's shelters.[560] No such privacy justification suggests itself in the case of telemarketers. Moreover, there is no conflict between the amended Rule's Caller ID provision and FCC regulations. The FTC's provision requires sellers and telemarketers to transmit Caller ID information; it does not create an obligation or a prohibition for common carriers. FCC regulations require certain carriers to provide a mechanism for blocking display of Caller ID information; they do not grant sellers and telemarketers the right to block transmission of that information.

§ 310.4(b)—Pattern of calls

Section 310.4(b)(1) of the original Rule specifies that "[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in," several practices deemed to be abusive of consumers. The proposed Rule contained

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[556] *See* note 526 above for more on SS7 technology.

[557] 47 CFR 64.1601.

[558] SBC-Supp. at 10-11.

[559] 67 FR at 4515, n.228. *See* also ATA-Supp. at 16; EPIC-NPRM at 14.

[560] *Id.*

some modifications to various subsections of this provision. The responses received in response to the NPRM, and the discussion at the June 2002 Forum, are set forth below.

§ 310.4(b)(1)(i)—Calling repeatedly or continuously

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing act or practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i).[561] Therefore, the language in that provision remains unchanged in the amended Rule.[562] However, the expansion in the scope of the Rule effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(b)(1)(ii)—Denying or interfering with "do-not-call" rights

In the NPRM, the Commission proposed to prohibit a telemarketer from denying or interfering in any way with a person's right to be placed on a "do-not-call" list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller's list of consumers who do not wish to receive calls made by or on behalf of that

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[561] In its comments in the Rule Review, NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales to coerce consumers to purchase a product, and noted that the organization advises consumers that one of the "warning signs of trouble" is the "three-call" technique used by fraudulent sellers of securities. NASAA-RR at 2.

[562] Section 310.4(b)(1)(i) of the amended Rule prohibits as an abusive practice "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."

seller.[563] In setting out the proposed prohibition, the Commission noted that during the Rule Review, numerous individual consumers had complained about being hung up on when they asked to be placed on a "do-not-call" list. In other instances, consumers complained that the telemarketer had used other means to hamper or impede these consumers' attempts to be placed on a "do-not-call" list. Participants in both the "Do-Not-Call" Forum and the Rule Review Forum echoed these complaints.[564]

A seller or telemarketer has an affirmative duty under the Rule to accept a "do-not-call" request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the "do-not-call" provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer's right to privacy.[565]

Those commenters who addressed this provision strongly supported the prohibition.[566] For example, NAAG stated that an express prohibition against denying or interfering with a consumer's right to be added to a company-specific "do-not-call" list clarifies the seriousness of the telemarketer's obligation to process the consumer's request and will raise confidence in the system.[567]

NAAG noted that the consumer who receives the telemarketing call generally must rely exclusively on the

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[563] 67 FR at 4516.

[564] *Id.*

[565] 15 U.S.C. 6102(a)(3)(A).

[566] *See*, e.g., ARDA-NPRM at 6; Assurant-NPRM at 7; NAAG-NPRM at 44; NCL-NPRM at 8; NYSCPB-NPRM at 5-6; Proctor-NPRM at 4.

[567] NAAG-NPRM at 44. *See* also NCL-NPRM at 8.

telemarketer's truthful disclosure of his or her identity and the nature of the call, and that consumers are often confused because many company names are very similar.[568] In this respect, the Commission's determination to require telemarketers to transmit Caller ID information, discussed above, will provide a valuable tool to both consumers and law enforcement agencies in identifying those telemarketers who fail to comply with their obligation to process the consumer's request.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to deny or interfere in any way with a person's right to be placed on a "do-not-call" list, including hanging up on the individual when he or she initiates such a request. Section 310.4(b)(1)(ii) of the amended Rule prohibits this practice, and encompasses both telemarketers soliciting the purchase of goods or services and those soliciting charitable contributions in accordance with the USA PATRIOT Act amendments.[569] In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person's right to be placed on a "do-not-call" list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a "rogue" telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat "do-not-call" requests.[570]

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[568] NAAG-NPRM at 44.

[569] Moreover, the Rule Review yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors' "do-not-call" requests, even when threatened with withdrawal of future support. *See* Peters-RR at 1.

[570] Because the USA PATRIOT Act amendments do not give the Commission jurisdiction over non-profit organizations, the prohibition against causing a telemarketer to deny or defeat "do-not-call" requests

§ 310.4(b)(1)(iii)—"Do-not-call"

The original Rule prohibited a seller or telemarketer from calling a person who had previously asked not to be called by or on behalf of the seller whose goods or services were offered.[571] The proposed Rule added a second "do-not-call" provision that would prohibit a seller or telemarketer from calling a consumer who had placed his or her name and/or telephone number on a centralized registry maintained by the Commission, unless the consumer had provided express authorization for the seller to call him or her.[572] To effectuate the USA PATRIOT Act amendments, the Commission also proposed that for-profit telemarketers who solicit charitable donations be subject to the proposed national registry.[573]

The national "do-not-call" registry proposal generated extensive comment.[574] Consumer and privacy advocates, as well as individual consumers, overwhelmingly supported the creation of such a registry.[575] Indeed, many recommended

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applies only to sellers of goods or services, not to non-profit organizations.

[571] 16 CFR 310.4(b)(1)(ii). This is termed a "company-specific" approach to eliminating unwanted telephone solicitations.

[572] Proposed Rule §§ 310.4(b)(1)(iii)(B) and 310.4(b)(1)(iii)(B)(1) and (2).

[573] 67 FR at 4516, 4519.

[574] As discussed above, the Commission received about 64,000 written and electronic comments in response to the NPRM, including over 45 supplemental comments from organizations and individuals and almost 15,000 comments from Gottschalks' customers that were submitted by Gottschalks as its supplemental comment. The vast majority of comments touched, at least in part, on the proposed national "do-not-call" registry.

[575] *See, e.g.*, DOJ-NPRM at 4 - 5; EPIC-NPRM at 2 - 3; LSAP-NPRM at 12; NAAG-NPRM at 4, 6, 12, 29; NACAA-NPRM at 2; NCLC-NPRM at 13; NCL-[NPRM at 8; NFPPA-NPRM at 1; Pelland-NPRM passim; Proctor-NPRM passim; PRC-NPRM at 2; Private Citizen-NPRM at 1; TDI-NPRM at 4 - 5; Worsham-NPRM at 1. Of the approximately 49,000

that the Commission take a more restrictive "opt-in" approach, and prohibit telemarketing except to those consumers who expressly agree in advance to accept sales calls.[576] State regulators also supported a national registry, provided it did not preempt the "do-not-call" legislation already passed in many states or preclude the states from enforcing these laws.[577]

A number of industry commenters supported the general concept of a national "do-not-call" registry that would preempt state "do-not-call" laws, provided an exemption for "existing business relationships" were added to the Rule. The need for an established business relationship exemption was the most emphatic and consistent theme of industry comments, but other points were raised as well. Some questioned whether the Commission had the statutory authority to establish such a registry.[578] Others argued that a national "do-not-call" registry would impose an unconstitutional restriction on commercial speech.[579] Still others felt that an FTC registry was not necessary because the current system was sufficient

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comments, about 33,000 supported the creation of a national registry, while about 13,700 opposed it. Of the 14,700 comments from Gottschalks" customers, almost 11,500 supported the creation of a "do-not-call" registry, while only about 1800 opposed the idea of a registry.

[576] *See, e.g.*, EPIC-NPRM at 4; NCL-NPRM at 8.

[577] *See, e.g.*, Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2. *See* also AARP-NPRM at 1; NCL-NPRM at 9-10; NCLC-NPRM at 13; PRC-NPRM at 4; Private Citizen-NPRM at 2; TDI-NPRM at 4-5.

[578] *See, e.g.*, Discover-NPRM at 2; ERA-NPRM at 26; NRF-NPRM at 2-3; NAA-NPRM at 2; Paramount-NPRM at 1; PMA-NPRM at 6, 24-26.

[579] *See, e.g.*, NAA-NPRM at 2; Paramount-NPRM at 2; PBP-NPRM passim; Redish-NPRM *passim*.

to protect consumer privacy.[580] These commenters supported increased enforcement of existing federal and state "do-not-call" laws. Charitable organizations and the telemarketers who serve them uniformly opposed the national "do-not-call" registry proposal if applicable to charitable solicitations by for-profit telemarketers. They argued that such a registry would violate the First Amendment and that it would have a devastating impact on the level of contributions that non-profit organizations depend upon to fulfill their missions.[581]

Based on the entire record in this proceeding, the Commission has determined to retain the provision in the original Rule that prohibits a seller or telemarketer from calling a consumer who has previously asked not to be called by or on behalf of that seller. The Commission has also determined to supplement that provision by amending the Rule to establish a national "do-not-call" registry. For the reasons set forth herein, the Commission has decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations. Calls on behalf of charitable organizations will be subject to the company-specific "do-not-call" provision. In addition, the Commission has decided to retain the provision that allows consumers who sign up on the national "do-not-call" registry to provide express agreement to specific sellers to call them, but has modified that provision to require that evidence of such agreements be written, not oral. Furthermore, the Commission has decided to supplement that express agreement provision with a narrowly-defined exemption for "established business relationships." The Commission is persuaded that

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[580] *See*, e.g., Craftmatic-NPRM at 3; ERA-NPRM at 5, 28; PMA-NPRM at 6; TeleStar-NPRM at 2; Weber-NPRM at 2.

[581] *See, e.g.*, DMA-NonProfit-NPRM passim; Not-for-Profit Coalition-NPRM passim; Hudson Bay-NPRM passim. *See* also June 2002 Tr. III at 110, 205-10.

these provisions will work in a complementary fashion to effectuate the appropriate balance between protecting consumer privacy and enabling sellers to have access to their existing customers. Of course, even a seller who is exempt from the prohibition against calling a consumer based on the existence of an "established business relationship" with that consumer must honor that consumer's direct request not to be called under the company-specific "do-not-call" provision.

Background. The original Rule's company-specific approach, which prohibited a seller or telemarketer from calling a person who had previously asked not to be called, was intended to prohibit abusive patterns of calls from a seller or telemarketer to a person. During the Rule Review, industry representatives generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.[582] The vast majority of individual commenters, however, joined by consumer groups and state law enforcement representatives, claimed that the TSR's company-specific "do-not-call" provision is inadequate to prevent the abusive patterns of calls it was intended to prohibit.[583] They cited several problems with the current "do-not-call" scheme as set out in the FTC and FCC regulations:[584] the

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[582] ARDA-RR at 2; ATA-RR at 8-10; Bell Atlantic-RR at 4; DMA-RR at 2; ERA-RR at 6; MPA-RR at 16; NAA-RR at 2; NASAA-RR at 4; PLP-RR at 1. *See also* DNC Tr. at 132-80.

[583] *See* NAAG-RR at 17-19; NCL-RR at 13-14; DNC Tr. at 132-80. See also, e.g., Anderson-RR at 1; Bennett-RR at 1; Card-RR at 1; Conway-RR at 1; Garbin-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 1; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Mitchelp-RR at 1; Nova53-RR at 1; Peters-RR at 1; Rothman-RR at 1; Vanderburg-RR at 1; Ver Steegt-RR at 1; Worsham-RR at 1.

[584] The FCC's "do-not-call" regulations under the TCPA are at 47 CFR 64.1201.

company-specific approach is extremely burdensome to consumers, who must repeat their "do-not-call" request with every telemarketer that calls;[585] consumers' repeated requests to be placed on a "do-not-call" list are ignored;[586] consumers have no way to verify that their names have been taken off of a company's calling list;[587] consumers find tnat using the TCPA's private right of action[588] is very complex and time-consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when;[589] and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.[590]

In addition to the fact that it has proven ineffective, there is another problem that is not even addressed by the company-specific provision. In particular, because a great many telemarketers are now placing huge patterns of unsolicited telemarketing calls,[591] many consumers find even an initial

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[585] Garbin-RR at 1; NAAG-RR at 17; Ver Steeg-RR at 1.

[586] Harper-RR at 1; Heagy-RR at 1; Holloway-RR at 1; Johnson-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Nova53-RR at 1; Nurik-RR at 1; Peters-RR at 1; Rothman-RR at 1; Runnels-RR at 1; Schiber-RR at 1; Schmied-RR at 1; Vanderburg-RR at 1.

[587] McCurdy-RR at 1; Schiber-RR at 1.

[588] The TCPA permits a person who receives more than one telephone call in violation of the FCC's "do-not-call" regulations to bring an action in an appropriate state court to enjoin the practice, to receive money damages, or both. 47 U.S.C. 227(b)(3). The consumer may recover actual monetary loss from the violation or receive $500 in damages for each violation, whichever is greater. *Id.* If the court finds that a company willfully or knowingly violated the FCC's "do-not-call" rules, it can award treble damages. *Id.*

[589] Kelly-RR at 1; NAAG-RR at 17-19; NACAA-RR at 2; NCL-RR at 13-14.

[590] Kelly-RR at 1.

[591] Based on figures provided by the telemarketing industry, a study prepared for CCC [estimates that the annual number of outbound calls that

call from a telemarketer or seller to be abusive and invasive of privacy. Several states responded to the growing consumer frustration with unsolicited telemarketing calls and the ineffectiveness of the company-specific approach by passing legislation to establish statewide "do-not-call" lists. To date, 27 states have passed such legislation, and numerous other states have considered similar bills.[592]

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are answered by a consumer is 16,129,411,765 (i.e., 16 billion calls). James C. Miller, III, Jonathan S. Bowater, Richard S. Higgins, and Robert Budd, "An Economic Assessment of Proposed Amendments to the Telemarketing Sales Rule," June 5, 2002, (hereinafter "Miller Study") at 28, Att. 1. This figure does not include those calls that are abandoned.

[592] DNC Tr. at 16, 137, 157-58. As of August, 2002, 27 states had passed "do-not-call" statutes. Florida established the first state "do-not-call" list in 1987. (Fla. Stat. Ann. § 501.059). Oregon and Alaska followed with "do-not-call" statutes in 1989. Instead of a central registry, these two states opted to require telephone companies to place a black dot in the telephone directory by the names of consumers who do not wish to receive telemarketing calls. (1999 Or. Laws 564; Alaska Stat. Ann. § 45.50.475). In 1999, Oregon replaced its "black dot" law with a "no-call" central registry program. (Or. Rev. Stat. § 464.567). *See* also article regarding Oregon law in 78 BNA Antitrust & Trade Reg. Report 97 (Feb. 4, 2000). After those three states adopted their statutes, there was little activity at the state level for about a decade. Then, in 1999, a new burst of legislation occurred as five more states passed "do-not-call" legislation—Alabama (Ala. Code § 8-19C); Arkansas (Ark. Code Ann. § 4-99-401); Georgia (Ga. Code Ann. § 46-5-27; *see* also rules at Ga. Comp. R. & Regs. 515-14-1); Kentucky (Ky. Rev. Stat. Ann. § 367. 46955(15)); and Tennessee (Tenn. Code Ann. § 65-4-401; see also rules at Tenn. Comp. R. & Regs. Chap. 1220-4-11). During 2000, six more states enacted "do-not-call" statutes—Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Idaho (Idaho Code § 48-1003); Maine (Me. Rev. Stat. § 4690-A); Missouri (Mo. Rev. Stat. § 407.1095); New York (N.Y. General Business Law § 399-z; *see* also rules at NY Comp. R. & Regs. tit. 12 § 4602); and Wyoming (Wyo. Stat. Ann. § 40-12-301). As of August, 2002, another eleven states had joined the ranks—California (S.B. 771, to be codified at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, to be codified at Colo. Rev. Stat. § 6-1-901); Illinois (S.B. 1830, signed Aug. 9, 2002); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Kansas

The comments received in response to the NPRM show that frustration with unsolicited telemarketing calls continues despite the efforts of the DMA, the states, and the TCPA/TSR company-specific approaches to the problem. Individual commenters overwhelmingly supported the establishment of a national "do-not-call" registry.[593] This was true even of those

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(S.B. 296, to be codified at Kan . Stat. Ann. 2001 Supp. § 50-670, signed May 29, 2002); Louisiana (H.B. 175, to be codified at La. Rev. Stat. 45:844.11); Massachusetts (H.B. 5225, signed Aug. 10, 2002); Minnesota (S.B. 3246, to be codified at Minn. Stat. § 325E.311, signed May 15, 2002); Oklahoma (S.B. 950, to be codified at Okla. Stat. tit. 15 § 775B.1, signed Apr. 15, 2002); Pennsylvania (H.B. 1469, to be codified as amendment to Pa. Cons. Stat. § 2241; Texas (H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001); Vermont (S. 62, Pub. Act 120, to be codified at Vt. Stat. Ann. tit. 9 § 2464a, signed June 5, 2002); and Wisconsin (Section 2435 of 2001 Wisconsin Act 16, 2001 S.B. 55, to be codified at Wis. Stat. 100.52). In addition, numerous states are considering or recently have considered laws that would create state-run "do-not-call" lists, including Arizona, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia. *See* Call Compliance table of state "do-not-call" laws and proposed legislation, http://www.callcompliance.com/pages/STATElist.html (accessed July 24, 2002). The "do-not-call" issue has also drawn the attention of federal legislators, who have introduced several bills aimed at addressing consumers' concerns. For example, in the 106th Congress, H.R. 3180 (introduced by Rep. Salmon) would have required telemarketers to tell consumers that they have a right to be placed on either the DMA's "do-not-call" list or on their state's "do-not-call" list. This proposal also would have required all telemarketers to obtain and reconcile the DMA and state "do-not-call" lists with their call lists. Similar legislation was introduced in the 107th Congress by Rep. King (H.R. 232, the "Telemarketing Victim Protection Act"). In addition, on December 20, 2001, Sen. Dodd introduced S. 1881, the "Telemarketing Intrusive Practices Act of 2001," which would require the FTC to establish a national "do-not-call" registry.

[593] The Commission received approximately 64,000 email and written comments. Of those, approximately 44,000 supported the proposed national "do-not-call" registry, while only about 15,000 opposed the

individuals who were already signed up on their state's "do-not-call" registry or on the DMA's TPS.[594] Although many of these individuals stated that they had found their state registry to be effective in reducing the number of unwanted calls, they thought that a national registry would be a beneficial addition to their state registry because, among other things, a central registry would eliminate some of the loopholes in the state laws, thus increasing coverage, and would provide the convenience of a one-stop method of reducing unwanted calls.[595] Similarly, individuals who were signed up on the DMA's TPS list also said that the list had been effective in reducing the number of unwanted calls, yet they felt that a national registry was needed because they were still receiving unwanted calls.[596]

Consumer groups supported the creation of a national "do-not-call" registry,[597] and some privacy advocates urged the

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creation of such a registry. (The remaining 5,000 comments did not address this issue.)

[594] The Commission received approximately 7,500 comments from consumers who live in states that have "do-not-call" statutes. *See*, e.g., Dan Seaman (AL) (Msg. 1127); Shawn Baumgartner (FL) (Msg. 2771); Edwin Rodriguez (CO) (Msg. 4573); Michelle Crouch (GA) (Msg. 4973); and Rona Owen (TX) (Msg. 6247).

[595] *See, e.g.*, Michelle Crouch (GA) (Msg. 4973); Dan Seaman (AL) (Msg. 1127) (state registry has too many exemptions); Clive and Jane Romig (FL) (Msg. 19125) (current remedies are inadequate).

[596] *See, e.g.*, Robert Winters (Msg. 18984) (resurgence of calls after a while); Gregory Stahmer (Feb. 21, Part 6, Msg. 150) (continues to get unwanted calls); Robert Baly (Feb. 27, Part 1, Msg. 551).

[597] AARP-NPRM at 1; CCA-NPRM at 1; ConsumerPrivacy Guide.com-NPRM at 1; EPIC-NPRM at 2-3; LSAP-NPRM at 12-15; NAAG-NPRM at 4; NACAA-NPRM at 2; NARUC-NPRM at 1, 3; NASUCA-NPRM at 2; NCL-NPRM at 8; NCLC-NPRM at 13; PRC-NPRM at 1; Worsham-NPRM at 1. The U.S. Department of Justice also supported the creation of a national "do-not-call" list maintained by the FTC. DOJ-NPRM at 4-5.

Commission to take an even more restrictive "opt-in" approach by banning telemarketing to any consumer who has not expressly agreed to receive telephone solicitations.[598] With certain caveats, state regulators also supported the proposal for a national "do-not-call" registry.[599] Some states that already have a state "do-not-call" list in place indicated that a national list would complement the current regime of state legislation and could be an effective addition to the arsenal of tools available to consumers in reducing unwanted calls.[600] However, states and consumer advocates cautioned that such a system should be implemented in close coordination with the states and should not supplant more restrictive state laws.[601]

Industry commenters generally believed that the current system is working and that a national "do-not-call" registry is unnecessary.[602] They expressed the view that the DMA's Telephone Preference Service ("TPS") is tantamount to a nat-

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[598] *See, e.g.*, EPIC-NPRM at 3; Worsham-NPRM at 5.

[599] *See, e.g.*, CCA-NPRM at 1; Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2.

[600] CCA-NPRM at 1; Connecticut-NPRM at 1; Kansas-NPRM at 1; NAAG-NPRM at 6, 12, 29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2.

[601] Connecticut-NPRM at 1-2, 3; Kansas-NPRM at 1; NAAG-NPRM at 6-13; NACAA-NPRM at 4-5; NCL-NPRM at 9; NYSCPB-NPRM at 2-4, 13-17; Private Citizen-NPRM at 2; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 3-4. *See also* June 2002 Tr. I at 19-40.

[602] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

ional "do-not-call" registry. In fact, according to their comments, the TPS has greater coverage than the FTC registry would have because it covers certain entities such as common carriers, banks, and charitable organizations beyond FTC jurisdiction.[603] They argued that these gaps in the national registry's coverage due to the FTC's limited jurisdiction would make a national "do-not-call" list more confusing than helpful to consumers.[604] Some industry members suggested that the states are the more appropriate forum for creation of "do-not-call" lists.[605] Some of these commenters argued that, unlike a national list, that must be "one size fits all," states can be more responsive to the needs of their citizens and tailor their lists to those differing needs.[606]

The record in this matter overwhelmingly shows the contrary—as detailed earlier, it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer. The comments also show that con-

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[603] *See, e.g.*, ATA-NPRM at 24-25; DMA-NPRM at 8-11; ERA-NPRM at 27-28; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM [at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[604] *See, e.g.*, ERA-NPRM at 28, 36; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

[605] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See* also Tennessee-NPRM at 6-7.

[606] *See, e.g.*, ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NEMA-NPRM at 4; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 3; Teleperformance-NPRM at 2; TRC-NPRM at 2. *See also* Tennessee-NPRM at 6-7.

sumers continue to be angered by and frustrated with the pattern of unsolicited telemarketing calls they receive from the multitude of sellers and telemarketers. A national "do-not-call" registry addresses both types of abuse. It provides a mechanism that a consumer may use to indicate that he or she finds unsolicited telemarketing calls abusive and an invasion of privacy. It will also protect a consumer from repeated abusive calls from a seller or telemarketer. These problems cannot be fully addressed by state lists. While state "do-not-call" lists may be effective in reducing calls for the citizens in those states, about half the states do not have such legislation. A federal list would protect those consumers who are not currently protected. In addition, as EPIC pointed out in its comment, the state "do-not-call" lists vary with regard to exempt entities, with some containing so many exemptions that virtually all telemarketers are exempt.[607] A federal list would provide uniformity with regard to those entities within the FTC's jurisdiction. Finally, although industry touts the state lists as the appropriate approach to "do-not-call," they also challenge the states' authority to regulate interstate calls under the state "do-not-call" laws.[608] The Telemarketing Act grants the states the authority to enforce the TSR in federal court.[609] Therefore, a national "do-not-call" registry maintained by the FTC pursuant to the TSR (and enforceable by the states) would quell any challenges to state "do-not-call" enforcement with respect to interstate telemarketing.

Some industry members would have the FTC forget about a national registry and continue to let consumers use the current national self-regulatory system set up through DMA's

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[607] EPIC-NPRM at 19.

[608] *See, e.g.*, ATA-NPRM at 24.

[609] 15 U.S.C. 6108.

TPS.[610] DMA has provided an important public service by administering the TPS, and the Commission applauds the efforts of the industry to regulate itself. However, the self-regulatory model has two serious shortcomings which limit its use as an effective national "do-not-call" registry: a self-regulatory system is voluntary; and to the extent that sanctions exist for non-compliance, DMA may apply those sanctions only against its members, not non-members.[611] On the other hand, lists established pursuant to the FTC Act and the Telemarketing Act, as well as those established pursuant to state law, have the force of law, and violators are subject to civil penalties. This type of sanction makes it more likely that companies will take their "do-not-call" obligations seriously.

The Commission recognizes that its jurisdictional limitations will impact the effectiveness of a national "do-not-call" registry. However, the Commission notes that while certain specific entities are exempt from coverage, the telemarketing companies that solicit on their behalf are nonetheless covered by the TSR.[612] Moreover, many consumers have signed up for state "do-not-call" lists,[613] all

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[610] *See, e.g.*, ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

[611] DMA has about 5,000 members. DMA-NPRM at 1.

[612] 67 FR at 4497.

[613] For example, Missouri and Indiana each have more than 1 million telephone numbers on their lists; New York's list contains more than 2 million numbers. *See* Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law, Office of Missouri Attorney General, June 28, 2002, http://www.ago.state.mo.us/062802.htm; and David Wessel, On Hold: Gagging the Telemarketers, WALL ST. J., Apr. 11, 2002, at A2. *See* also NAAG-NPRM at 4, n.3.

of which include various exemptions. Consumers in those states have accepted the limitations of the state "do-not-call" lists and have been satisfied at the prospect of at least *reducing* the number of unwanted telephone solicitations that they receive.[614] Indeed, an FTC registry may be more inclusive than some state "do-not-call" lists.[615] The Commission believes that consumer education will minimize consumer confusion over what calls will and will not be allowed under a national "do-not-call" registry.

Industry pointed to the economic importance of outbound telemarketing, which accounted for $274.2 billion in 2001,[616] and warned that a national "do-not-call" registry would have dire economic consequences.[617] In its supplemental comments, DMA submitted a study showing "the face of the telemarketing industry."[618] According to DMA predictions, job losses would impact most seriously on women, minorities, and rural areas—the groups and regions from which most telemarketers are drawn.[619] Individual sellers and

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[614] *See generally* June 2002 Tr. I at 110-21.

[615] *See* EPIC-NPRM at 19 (noting that some state laws are ineffective due to the number of exempted entities).

[616] DMA, "The Faces and Places of Outbound Telemarketing in the United States," (June 2002) ("DMA study") at 1.

[617] *See id. See* also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

[618] DMA study, *see* note 616 above.

[619] The DMA study indicates that teleservices workers are overwhelmingly female, high-school educated, and African-American or Hispanic. Almost 62 percent of all females working as teleservices agents are working mothers, and 30 percent are part of a welfare-to-work program or were recently on public assistance. DMA study at 2. The study also indicates that outbound telemarketing call centers can be found in every state, often in rural areas or small towns and cities that are economically distressed. *Id.* at 4. *See* also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect.[620] Numerous individual telemarketers submitted comments in which they talked about the pride they have in their work and their fear of losing their livelihood.[621]

The Commission recognizes that telemarketing is a legitimate method of selling goods and services. It is important to remember that the "do-not-call" registry will impact only outbound telemarketing, and will have no effect whatsoever on the greater portion of the industry devoted to inbound calls from consumers.[622] The Commission also recognizes the importance of outbound telemarketing to federal, state, and local economies. Telemarketing provides needed jobs to rural areas and small towns that often face high unemployment, and to people who often face difficulties in obtaining other employment, such as individuals moving off of welfare.

Although industry fears the economic impact a national registry might have, ironically, an FTC "do-not-call" registry may actually benefit rather than harm industry. For example,

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[620] *See* NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1; Teleperformance-NPRM at 2; TRC-NPRM at 2-3. However, the Commission notes that these companies offered no analysis to substantiate their claims regarding the impact of the national registry.

[621] *See, e.g.*, Alhafez (Mar. 22, part 1, Msg. 1712); Cameron (Mar. 6, part 1, Msg. 951); Dillon (Mar. 21, part 2, Msg. 162[illegible] *see also, e.g.*, ACI Telecentrics-[Levie (Msg. 19322); InfoCision Man[illegible]ment-Davis (Msg. 23968); HFC-Beneficial-Darst (Msg. 33709); Household-Alioto (Msg. 27876); LTD Direct-Rockwood (Msg. 27601); and TCIM Services Inc.-Davis (Msg. 22871).

[622] In 2001, inbound telemarketing accounted for 55 percent of total teleservice expenditures and was expected to grow to 62 percent by 2004. Winterberry Group, "Industry Map: Teleservice Industry—Multi-Channel Marketing Drives Universal Call Centers" at 9 (Jan. 2001).

the federal framework, with its exemptions, would provide greater consistency of coverage, at least with regard to interstate calls. In addition, industry would benefit because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls.[623]

Industry emphasized the importance of harmonizing federal and state laws. To the extent that industry members supported creation of a national "do-not-call" list, they conditioned their support on preemption of state laws.[624] These commenters argued that the major, if not only, benefit to industry from a national "do-not-call" registry would be to eliminate the costs of purchasing multiple lists and complying with a patchwork of potentially 50 different state laws.[625] Absent preemption, industry believed that a national registry would only add another layer of bureaucracy and one more list that they must purchase.[626] The June 2002 Forum discussed in depth the interplay between the national "do-not-call" registry and state laws. Participants agreed that the Commission should seek comity with state laws, and that a

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[623] Industry representatives also have indicated that they do not wish to call consumers who do not want to receive telemarketing calls. *See* DNC Tr. at 41, 51, 53-56, 61, 71.

[624] *See, e.g.*, AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4; Community Bankers-Supp. at 4; ARDA-Supp. at 1; ICTA-Supp. at 1. *See* also June 2002 Tr. at 19-40.

[625] *See, e.g.*, AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4.

[626] *Id.*

single list would provide substantial benefits to both industry and consumers.[627]

For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission's "do-not-call" proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of $6.6 million to purchase access to the FTC's "do-not-call" registry and to check their calling lists against the "do-not-call" list to ensure that they do not call consumers who have asked not to be called.[628] If companies could comply with both FTC and state regulations by purchasing access to the FTC's list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirements, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate $100 million.[629]

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[627] *See* June 2002 Tr. I at 19-40.

[628] *See* June 2002 Tr. I at 209. Dr. Miller's testimony drew from the Miller Study (see note 591 above). As the study explains, the $6.6 million figure assumes that 3,000 firms will pay $1,000 each on average to obtain access to the list and that it will take the average firm approximately two hours of effort at a cost of $50 per hour each time it is necessary to compare the firm's calling list against the "do-not-call" registry. As proposed in the NPRM, firms would have been required to do this comparison 12 times each year so that the average firm would have incurred a total expense of $2,200. Miller Study at 11-12. Because the amended Rule does not require firms to compare their calling lists to the FTC's "do-not-call" registry monthly as did the NPRM proposal, the estimated cost using Dr. Miller's methodology would now be around $4.5 million.

[629] *See* June 2002 Tr. I at 209.

Finally, commenters raised various issues and offered suggestions relating to the implementation of a national "do-not-call" registry. For example, various commenters questioned the accuracy of automatic number identification ("ANI") verification, the length of time a consumer's telephone number should remain on the list, who should be able to sign up for the list, whether the Commission should allow third parties to submit telephone numbers, the type of information that should be collected, and the accuracy of the Commission's cost estimates.[630] These issues are discussed in the section below addressing implementation.

Coverage of the "do-not-call" provisions. A number of commenters asked the Commission to clarify coverage of its "do-not-call" provisions. Some queried whether calls to home businesses would be subject to the "do-not-call" requirements.[631] The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's "do-not-call" requirements.

Some commenters asked whether the "do-not-call" requirements would cover calls to cellular or wireless telephones and pagers. The Commission intends that § 310.4 (b)(1)(iii) apply to any call placed to a consumer, whether to a residential telephone number or to the consumer's cellular telephone or pager. Consumers are increasingly using cellular telephones in place of regular telephone service,[632] which is

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[630] *See, e.g.*, AFSA-NPRM at 4-10; Craftmatic-NPRM at 3; DC-NPRM at 5; DialAmerica-NPRM at 13; Discover-NPRM at 3; EPIC-NPRM at 14; ERA-NPRM at 29-32; HSBC-NPRM at 2; MBA-NPRM at 2; NYSCPB-NPRM at 7-13. *See* also June 2002 Tr. I at 138-271.

[631] *See, e.g.*, IBM-NPRM at 11-12; Pelland-NPRM at 3.

[632] *See* FCC Notice of Proposed Rulemaking and Memorandum Opinion and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278,

borne out by the dramatic increase in cellular phone usage.[633] The Commission believes that it is particularly important to allow consumers an option to reduce unwanted telemarketing calls to cellular telephones or to pagers because some cellular services charge the consumer for incoming calls, thus adding insult to injury when the consumer is charged for the unwanted telemarketing call to the consumer's cellular telephone.[634]

Established business relationship. Industry commenters overwhelmingly opposed as unworkable the Commission's proposal to allow consumers to give their express authorization to companies from which they wished to receive calls. Industry stated that it would be cost prohibitive for them to contact their customers to obtain authorization (although they provided no detailed support for this argument) and that consumer inertia would keep consumers from independently

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CC Docket No. 92-90 (Sept. 18, 2002) (hereinafter "FCC TCPA 2002") at 27, para. 42 (citing a USA Today/CNN/Gallop poll showing that one in five mobile telephone users use their wireless phone as their primary phone, Michelle Kessler, 18 % *See* Cellphones as Their Main Phone, USA TODAY, Feb. 1, 2002). *See also* Wendy Ruenzel, More Cell Phone Users Dispense with Traditional Phone Line, POST CRESCENT, Aug. 6, 2001; Simon Romero, When the Cellphone Is the Home Phone, N.Y. TIMES, Aug. 29, 2002; Joelle Tessler, Small But Growing Number of Cell Phone Users Abandon Land Lines, SAN JOSE MERCURY NEWS, Aug. 15, 2002.

[633] *See* FCC TCPA 2002 at 26-27, para. 42, n.160 (noting that, in the ten-year period between 1991 and 2001, the number of wireless subscribers increased from about 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per subscriber per month increased from 140 minutes to 385 minutes.) (citations omitted).

[634] *See, e.g.*, Andy Vuong, Telemarketers tap cellphone: Complaints on rise as solicitors dial into no-call exemption, DENVER POST, July 30, 2002; Jennifer Bayot, Now, That Ringing Cellphone May Be a Telemarketer's Call, N.Y. TIMES, July 5, 2002.

providing that type of affirmative authorization.[635] They also argued that consumers may not know in advance which companies they want to hear from.[636]

Industry commenters noted that, without an exemption permitting calls to existing customers, companies would be unable to conduct normal servicing of customers' accounts, since such customer service calls frequently are multiple purpose calls that also include attempts to sell additional goods or services to the customer.[637] Additionally, magazines and newspapers would be unable to contact consumers whose subscriptions had expired to offer them a new subscription.[638] Commenters from financial institutions pointed out that, if not permitted to call current customers, they may run afoul of their fiduciary relationship with those customers.[639] Sellers argued that it would be cost prohibitive for them to use direct mail or other means to contact their customers to obtain authorization to call.[640]

Industry commenters also pointed out that, in failing to include an exemption for existing business relationships, the

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[635] *See, e.g.*, AFSA-NPRM at 8; BofA-NPRM at 9; Cox-NPRM at 6; MBA-NPRM at 5.

[636] FN636 *See, e.g.*, DialAmerica-NPRM at 14; Roundtable-NPRM at 4-5.

[637] *See, e.g.*, ACA-NPRM at 2; ARDA-NPRM at 17; Associations-NPRM at 2; Cendant-NPRM at 5; Comcast-NPRM at 2; DMA-NPRM at 34; HSBC-NPRM at 1; MBA-NPRM at 1-2.

[638] *See* NAA-NPRM at 12, June 28-Supp. at 1, and July 31-Supp. at 1; NNA-NPRM at 3.

[639] *See, e.g.*, ABA-NPRM at 10; ABIA-NPRM at 4; AFSA-NPRM at 13-14; AmEx-NPRM at 3; BofA-NPRM at 3; Bank One-NPRM at 4-5; VISA-NPRM at 13; Wells Fargo-NPRM at 4. However, unless such a customer service call includes an inducement to purchase additional goods or services, it would fall outside the definition of "telemarketing" and, therefore, beyond the scope of the Rule's coverage.

[640] *See, e.g.*, Comcast-NPRM at 2; CAP-Supp. at 1-2.

proposed Rule was at odds with the approach taken by the states with regard to "do-not-call" registries. All state "do-not-call" laws, except Indiana's, include such an exemption.[641] State regulators noted that there have been few complaints from consumers about calls from companies with whom they have an existing business relationship.[642] In addition, FCC regulations under the TCPA exempt "established business relationships" from the company-specific "do-not-call" regulations.[643] Individual commenters who expressed an opinion on this issue were divided on whether there should be such an exemption. Analysis of individual consumer comments that touched on this issue indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1080 opposed such an exemption.[644] Further-

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[641] *See, e.g.*, Ark. Code Ann. § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(B)(II); Conn. Gen. Stat. Ann. § 42-288a(a)(9); Fla. Stat. Ann. § 501.059(1)(c); Ga. Code Ann. § 46-5-27(b)(3)(B); Mo. Rev. Stat. § 407.1095(3)(b); and Tenn. Code Ann. § 65-4-401(6)(B)(iii).

[642] *See* June 2002 Tr. I at 118 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say that's prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad."); June 2002 Tr. I at 118-19 (Missouri: "Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now."); and *see* generally, June 2002 Tr. I at 110-21.

[643] 47 CFR 64.1200(c)(3). The TCPA requires such an exemption. 47 U.S.C. 227(a)(3).

[644] *See, e.g.*, GBELois (Msg. 44) ("If a person is a member, subscriber, current customer, etc., of a company and the company is calling regarding the status of that relationship then the company should not be obligated to

more, over 13,000 of the nearly 15,000 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a "do-not-call" registry to block other calls.

Finally, industry commenters suggested that the Commission's rationale for not including an exemption for "established business relationships" was faulty.[645] In adopting the original Rule, the Commission had expressed the view that such an exemption was inappropriate because it was not workable in the context of fraud.[646] These commenters pointed out that the "do-not-call" registry was driven by privacy concerns, not concerns about fraud. Therefore, they argued, the Commission's stated rationale was inapplicable in the "do-not-call" context.[647] However, these commenters misunderstood the Commission's rationale in not including an exemption for "established business relationship" in the proposed "do-not-call" provision. In fact, the Commission's rationale for not including such an exemption in its proposal was driven not by concerns about fraud, but by the same privacy concerns that those commenters noted. The

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conform to the do not call registry."); Jerry Warnke (Msg. 371) ("Have to be a way to exempt businesses or organizations when they are returning your phone calls or they have a need to call you with an ongoing relationship."). But *see, e.g.*, Karl Engelberger (Msg. 331) ("All pre-existing agreements and relationships should be voided and can, at the line subscribers discretion be re-established."); Don Price (Msg. 483) ("Sometimes pre-existing relationships are those hardest to communicate with regarding the fact that the individual wants to end the relationship with the telemarketer business—once you give or buy something, many telemarketers expect you to continue what you started and make it a monthly habit—even if that was never your intent.").

[645] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

[646] *See* 60 FR at 43859.

[647] *See, e.g.*, DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

Commission believed that the national registry should contain few exemptions in order to provide consumers with the most comprehensive privacy protection possible.

Because the proposed Rule did not contain any "established business relationship" exemption, it is not surprising that few commenters raised this issue unless they were advocating that such an exemption be added. In response to industry's strong advocacy in favor of an "established business relationship" exemption, however, the June 2002 Forum elicited comment on whether such an exemption would be appropriate. Privacy advocates opposed any exemptions to the registry, stating that exemptions erode the effectiveness of a "do-not-call" registry.[648] These commenters feared that, because of the difficulty in crafting such an exemption narrowly, an "established business relationship" exemption would provide too great a loophole, and would severely hamper the effectiveness of a national "do-not-call" registry.[649] One consumer spoke at the June 2002 Forum about the dangers inherent in such an exemption.[650] AARP noted in its supplemental comments that an exemption appeared to be necessary, but urged that the Commission keep the exemption very narrow and limit it to existing relationships only, as opposed to prior relationships.[651]

Based on the record as a whole, the Commission is persuaded that the benefits of including an exemption for established business relationships outweigh the costs of such an exemption. Therefore, the Commission has decided to provide an exemption for "established business relationships" from the national "do-not-call" registry, as long as the consumer has not asked to be placed on the seller's company-

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[648] *See, e.g.*, EPIC-NPRM at 20-21; NCL-NPRM at 10.

[649] NCL-NPRM at 10.

[650] June 2002 Tr. I at 278-82 (Diana Mey).

[651] AARP-Supp. at 3.

specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific "do-not-call" request.[652]

The amended Rule limits the "established business relationship" exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within 18 months of the telephone call or, in the case of inquiries or applications, to three months from the inquiry or application. As indicated in the discussion of the definition of "established business relationship" in § 310.2(n), this time frame is consistent with most state laws that include a time limit.[653] The exemption is terminated by the consumer's request to be placed on the company's "do-not-call" list, which is consistent with the FCC's regulations and those of many of the states.[654] As explained above in the discussion of § 310.2(n), the definition

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[652] *See* June 2002 Tr. I at 278-82 (Consumer recounted that a telemarketer from a retailer telephoned her, notwithstanding the fact that she was on the retailer's "do-not-call" list. When she questioned them about this apparent error, the telemarketer said that she had recently made a purchase at the retailer, which re-created an "established business relationship," which exempted them from complying with her "do-not-call" request.).

[653] *See* discussion of § 310.2(n) and note 135, above.

[654] *See* 47 CFR 64.1200(f)(4), and discussion in FCC TCPA 2002 (*see* note 633 above) at 8765, para. 23, and at 8770, para. 34, n.63. In addition, several state "do-not-call" statutes contain a similar provision in their exemption for "established business relationships" which terminates the exemption if the consumer has asked not to be called. *See, e.g.*, Alaska, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas, and Wyoming. *See* note 592, above, for citations to each state's "no-call" laws and/or regulations.

of "established business relationship" encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.

In addition to an exemption for "established business relationships," the Commission has decided to retain the provision that allows sellers to obtain the express agreement of consumers who wish to receive telephone calls from that seller, but has modified the provision to require that such express agreement may be evidenced only by a signed, written agreement. The Commission believes that it is important to limit the established business relationship to those where there is ongoing contact or where the relationship has recently lapsed or terminated. However, the Commission recognizes that consumers may have ongoing relationships with sellers where the contacts may be infrequent. Therefore, the Commission has decided to retain the provision that would allow sellers to obtain the consumer's express agreement to call, regardless of whether there has been contact during the prior 18 months. In order to minimize the potential for abuse, the amended Rule does not permit sellers or telemarketers to obtain the consumer's oral authorization. Rather, the amended Rule requires that the express agreement meet the same standards as written authorization in § 310.3(a)(3)(i)—*i.e.*, that the express agreement be in writing, signed by the consumer—and must also include the telephone number to which the calls may be placed. Because the express agreement requires the consumer's signature, the Rule makes it more difficult for sellers and telemarketers to bury the consent in the fine print of a document where the consumer might not notice it. The Commission intends that the consent be clear and conspicuous. This express agreement is effective as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again

regardless of whether the consumer continues to do business with the seller.

First Amendment and related considerations applicable to "do-not-call" provisions. As noted above, the proposal to include charitable solicitation telemarketing by for-profit telemarketers within the scope of a national "do-not-call" registry requirement drew extensive negative comment from non-profit organizations and their representatives. These commenters advanced a number of criticisms of the proposal based upon the practical effects it would foreseeably produce if adopted. They also argued that the proposal was fatally flawed from the standpoint of First Amendment analysis. Each of the major points made by these commenters is discussed below.

Because of the central role of the telephone and of professional fundraisers in the non-profit arena, non-profit organizations and their representatives uniformly predicted financial disaster for the non-profit sector if such a proposal were adopted.[655] According to DMA-NonProfit, a quarter of all charitable contributions raised in 2001 came from telephone solicitation,[656] and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers.[657] These commenters feared the detrimental impact of a national

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[655] *See, e.g.*, DMA-NonProfit-NPRM at 16; Not-for-Profit Coalition-NPRM at 7. *See* also Red Cross-NPRM at 3; APTS-NPRM at 2-3; Childhood Leukemia-NPRM at 1; FireCo-NPRM at 1; California FFA-NPRM at 2; Edwardsville FFA-NPRM at 1; HRC-NPRM at 1-2; Leukemia Society-NRPM at 1-2; March of Dimes-NPRM at 1; Michigan Nonprofit-NPRM at 1; Purple Heart-NPRM at 2; NC Zoo-NPRM at 1; NPR-NPRM at 2; AAST-NPRM at 5; FOP-NPRM at 2; Southern Poverty-NPRM at 2.

[656] DMA-NonProfit-NPRM at 2 (citing the Turner Study, *see* note 142 above).

[657] DMA-NonProfit-NPRM at 2. *See* also Not-for-Profit Coalition-NPRM at 6.

"do-not-call" registry on this important element of the non-profit world's financial support system.[658] One commenter opined that the proposed "do-not-call" registry requirement would reduce the potential donor pool by between 40 to 50 percent, and based on sign-up rates in some states, possibly by as much as 70 or 80 percent.[659]

The proposed registry's impact on non-profit organizations' ability to solicit previous donors was of particular concern. According to a number of commenters, it is axiomatic that persons who have already contributed to a non-profit or charitable organization are much more likely to contribute than are persons who have never done so.[660] In this regard, Not-for-Profit Coalition stated that "[c]ompounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide non-profit and charitable organizations as well as new prospective donors. Depriving charities and non-profits of the ability to contact prior supporters will be financially devastating."[661]

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[658] *See, e.g.*, ACE-NPRM at 1; ADA-NPRM at 1; Red Cross-NPRM at 3; Blood Centers-NPRM at 2; Childhood Leukemia-NPRM at 1; LifeShare-NPRM at 1; March of Dimes-NPRM at 2; NPR-NPRM at 4-5; FOP-NPRM at 3, 4; Project Angel Food-NPRM at 1.

[659] Not-for-Profit Coalition-NPRM at 9.

[660] AFP-NPRM at 4 ("For nearly all nonprofit organizations, pre-existing donors and volunteers constitute the source of a majority of all gifts and volunteer time. These individuals are most committed to a cause and best understand the organization. Donors should not lose the opportunity to hear from organizations they supported in the past."); March of Dimes-NPRM at 3 ("The most generous donors and volunteers are [those who have a prior relationship with the Foundation . . . . If the Foundation cannot contact prior donors and volunteers on the basis of a preexisting relationship, then the effectiveness of our fundraising program will be jeopardized." *See also, e.g.*, APTS-NPRM at 2; ADA-NPRM at 1; AAST-NPRM at 3; FireCo-NPRM at 1; NTC-NPRM at 3; Southern Poverty-NPRM at 2; NCLF-NPRM at 1.

[661] Not-for-Profit Coalition-NPRM at 10.

Not-for-Profit Coalition also argued that the effect of the "do-not-call" registry requirement would be to drive non-profit organizations away from efficient use of professional telefunders, and toward inefficient in-house operations.[662] According to commenters, the efficiency benefits of using professional telefunders may be substantial. For example, Hudson Bay stated:

> HBC's phone canvass is mostly for smaller non-profit organizations (and the state chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee.[663]

Several representatives of non-profit organizations argued that under relevant First Amendment precedent, charitable fundraising is fully protected speech, and that attempts by the government to regulate it are subject to the highest level of scrutiny.[664] These commenters also noted that under the relevant precedents, no distinction between the speech of the non-profit organization and that of the professional telefunder actually making the calls is recognized—both are equally protected. Several criticized the proposal's exemptions for solicitations by "political clubs, committees, or parties" and "constituted religious organizations" as making distinctions

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[662] *Id.* at 18, 19.

[663] Hudson Bay-Goodman-NPRM at 2. *See also, e.g.*, APTS-NPRM at 3; Not-For-Profit Coalition-NPRM at 19.

[664] *See, e.g.*, Hudson Bay-Goodman-NPRM at 4, 5; DMA-NonProfit-NPRM at 7; Not-For-Profit Coalition-NPRM at 15.

based on the type of speech or speaker that are impermissible under the First Amendment.[665]

The Commission believes that, with respect to telemarketing that solicits sales of goods or services, the "do-not-call" registry provisions are consistent with the relevant First Amendment cases. In *Central Hudson Gas & Elec. v. Pub Serv. Comm.* of N.Y., the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.[666] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves[667] —that is, there must be "a 'fit' between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[668]

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls is a substantial governmental interest.[669]

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[665] *See*, e.g., DMA-NonProfit-NPRM at 5, 6; Not-for-Profit Coalition at 41.

[666] 447 U.S. 557 (1980).

[667] *Id.* at 566.

[668] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[669] In some instances, the "do-not-call" registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers. Cf. *Metromedia v. San Diego*, 453 U.S. 490, 509 (1981) (holding, inter alia, that San Diego's "twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.")

"Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom."[670] The "do-not-call" registry is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls. Simply put, sellers or telemarketers soliciting sales may not call persons who have placed themselves on the registry. The registry is also designed to cure the inadequacies as a privacy protection measure that became apparent in the company-specific "do-not-call" provisions included in the original Rule.[671] Thus, the second of Central Hudson's criteria is satisfied. Finally, the national "do-not-call" registry is a mechanism closely and exclusively fitted to the purpose of protecting consumers from unwanted telemarketing calls.

In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.[672] The Court stated:

> We therefore categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain. . . . To hold less would tend to

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[670] *Frisby v. Schultz*, 487 US 474, 485 (1988).

[671] The shortcomings of the company-specific approach are set forth above in the discussion of § 310.4(b)(1)(iii).

[672] 397 U.S. 728 (1969).

> license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.[673]

Under *Rowan*, the First Amendment allows a statutory scheme whereby a person may block a sender's mailings by notifying the Postmaster General, who then will prevent that sender's mailings from being delivered to that person. The Commission believes that the First Amendment similarly raises no impediment to Rule provisions that will enable a person by signing up on a national "do-not-call" registry to block commercial communications via telephone, which are far more intrusive than the communications, at issue in *Rowan*, via printed words and images.[674]

With respect to telemarketing that solicits charitable contributions, the Commission believes that the applicable analyt-

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[673] *Id.*, at 737-38 (internal citations omitted).

[674] While the statute under consideration in Rowan was focused on mailed advertisements of a sexual nature, the Court specifically rejected arguments that it should be read narrowly to cover only "salacious" or "pandering" advertisements—or even all advertisements. Instead, the court upheld the statute interpreted as covering all mailings from the sender, regardless of whether they were advertisements, and regardless of [whether they were sexually provocative. The determinative factor was that the mailings were unwanted. The Commission does not advance a theory, however, that Rowan should be read here to cover any non-commercial communications.

ical framework is more stringent.[675] "[C]haritable solicitations involve a variety of speech interests . . . that are within the protection of the First Amendment and therefore have not been dealt with as purely commercial speech."[676] In considering the more stringent analysis, the Commission notes, preliminarily, that the company-specific "do-not-call" provisions that apply to charitable solicitation telemarketing are content-neutral. "Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[677] The

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[675] Metromedia makes clear that a less exacting standard is applied in analyzing a regulation's constitutionality with respect to commercial speech than in analyzing the same regulation's constitutionality with respect to noncommercial speech. "[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of Central Hudson. . . . It does not follow, however, that San Diego's ban on signs carrying noncommercial advertising is also valid . . . . Commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." Metromedia, 453 U.S. at 513. In *Watchtower Bible and Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080 (2002), where the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance might have been constitutional if it were limited to commercial speech. *Id.* at 2089. This may be dicta, but it is significant because the Court seems to have approved a distinction between commercial and noncommercial speech—the same distinction drawn in the amended Rule—and to have done so in the same context as the Rule, i.e., solicitation that threatens to invade the privacy of the home.

[676] *Riley v. Nat'l. Fed. of the Blind*, 487 U.S. 781 (1988) (internal quotation marks omitted).

[677] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994). "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." Turner at 642, citing *Clark v. Cmty.* for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[The] principal inquiry in determining content neutrality is whether the government has adopted a

company-specific "do-not-call" provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made. Thus, these provisions are content-neutral.[678]

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitation, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.[679] However, the case law also indicates that, in the case of charitable solicitation, greater care must be given to ensuring that the governmental interest is actually advanced by the regulatory remedy, and tailoring the regulation narrowly so as to minimize its impact on First Amendment rights. In *Riley and Schaumburg*, the Court rigorously

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regulation of speech because of disagreement with the message it conveys."). *See also Am. Target Adver. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (200) (applying this principle in the context of solicitation).

[678] Similarly, the "do-not-call" registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.

[679] "The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation." Watchtower, 122 S. Ct. 2080 (2002); *Schaumburg v. Citizens for Better Env't.*, 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial).

examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser's fee. The Court struck down the laws because there was, in the Court's view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser's fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not tailored narrowly enough to minimize the impact on the charities' First Amendment rights.

By contrast, a very tight nexus exists between the Commission's legitimate interest in protecting consumers' privacy against unwanted telemarketing calls and the company-specific "do-not-call" provisions that apply to telemarketing to solicit charitable contributions. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder takes as its fee. Rather, there is a direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future.

The Commission approaches with extreme care the issue of tailoring "do-not-call" requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. The Commission is concerned that subjecting charitable solicitation telemarketing—along with commercial telemarketing to solicit sales of goods and services—to national "do-not-call" registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable

side-effect resulting from signing up for the registry to stop sales solicitation calls.[680] In the NPRM, the Commission proposed to resolve this problem by including in the Rule a provision enabling consumers who signed up for the "do-not-call" registry nonetheless to choose selectively to receive calls from specific entities from whom they would welcome solicitation calls. This proposed solution met with uniform condemnation from non-profit organizations, who opined that it would be too costly for non-profit organizations to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them.[681] The Commission is persuaded that these objections may be well-founded, and that this, therefore, would not be an adequate approach to narrow tailoring.

Another solution alluded to in a specific question posed in the NPRM might be to bifurcate the registry into separate categories, one for commercial solicitation and another for charitable solicitation, enabling consumers to sign up separately to stop commercial calls while allowing charitable solicitations.[682] At this time, however, the Commission

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[680] Childhood Leukemia-NPRM at 1 ("I firmly believe if this change is implemented, people attempting to avoid calls from those who sell goods and services over the telephone will put themselves out of reach of our organization, thereby threatening our financial foundation. Th victims will be the children because we will no longer have the resources to help them.")

[681] Non-profit organizations also argued that this proposal was tantamount to a constitutionally impermissible requirement for non-profits to seek permission to speak before speaking.

[682] "Should the "do-not-call" registry be structured so that requests not to receive [telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?" Question 5 i, 67 FR at 4539. Few commenters addressed this question, and those who did so expressed only the most general views, without advocating or opposing the concept of bifurcation. *See, e.g.*, NYSCPB-NPRM at 23 ("[T]he technical problems and costs of

believes that such an approach may be impractical because of cost considerations and because of the difficulty for consumers to understand and deal with the complications of such a system. Thus, these factors may render a bifurcated registry an insufficient or excessively cumbersome response to the imperative of narrow tailoring.

After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the "do-not-call" provisions at this time is to exempt from the "do-not-call" registry requirements solicitations to induce charitable contributions via outbound telephone calls,[683] and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific "do-not-call" regime contained in the original Rule.[684]

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implementing such a system might be prohibitive."); NCLC-NPRM at 19; NCL-NPRM at 9; NAAG-NPRM at 20. Only about 100 individual consumer email comments received by the Commission responded to a direct question on the issue included on the Commission's website. A minority of these commenters (about 40 percent) expressed the view that the "do-not-call" registry should not treat calls from charitable fundraisers differently, while about 60 percent expressed the view that it should do so.

[683] "Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule." Section 310.6(a) of the amended Rule.

[684] The comments of many non-profit or charitable organizations indicate that these organizations have a policy of maintaining a "do-not-call" list even though not legally required to do so. Lautman-NPRM at 1 ("[Professional fundraisers] use the Direct Marketing Association's 'do not call' database, in addition to client maintained 'do not call' lists."); HRC-NPRM at 1 ("[W]e have (like most nonprofit organizations) eliminated unwanted calls to our donors by requiring our telemarketing partners to keep a 'do-not-call' list. We also require them to use the Direct Marketing Association's 'do not call' list."); Telefund-NPRM at 1 ("Most non-profit organizations maintain lists of their own donors who prefer to be contacted via the mail. Telefund Inc. also maintains such a database for its clients."). *See also* ADA-NPRM at 1; American Rivers-NPRM at 1;

The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution.[685] Thus, the Commission rejects the suggestion from numerous non-profit organizations and their representatives that no privacy protection measures are necessary with respect to charitable solicitation telemarketing, and that telefunders should be exempt from even the company-specific "do-not-call" provisions.[686]

The Commission believes that even though the company-specific approach has not been fully adequate to the task of protecting consumers' privacy rights against an onslaught of commercial solicitations, this more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech. The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-

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Angel Food-NPRM at 1; APTS-NPRM at 3; Childhood Leukemia-NPRM at 1; FOP-NPRM at 1; Italian American Police-NPRM at 1; Illinois Police-NPRM at 1; Leukemia Society-NPRM at 2; SO-CN-NPRM at 1; SO-CO-NPRM at 1; National Children's Cancer-NPRM at 1; Southern Poverty-NPRM at 2; Stage Door-NPRM at 1.

[685] One indication of this is that, even though the FTC web page advising consumers on how to comment specifically included a direct question calling attention to the possibility of a separate database for charitable fundraisers, only about 100 consumer email comments responded to it. A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.

[686] *See generally* Not-For-Profit Coalition-NPRM; DMA-Non-Profit-NPRM.

call" requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:

> When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.
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> In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the recipient of the call against the cause not just against the caller or their organization.[687]

Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protections for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may

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[687] *See also* HRC-NPRM at 1 ("Most importantly, nonprofits are dependent upon the revenue generated by their supporters and will do nearly anything to honor their requests and treat them with the utmost respect.")

revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national "do-not-call" registry requirements.

FTC authority to establish a "do-not-call" registry. Several industry members questioned whether the FTC had the statutory authority to establish a national "do-not-call" registry.[688] They argued that the Telemarketing Act does not mention the creation of a "do-not-call" registry and that, in fact, another statute (TCPA) had directed another agency (the FCC) to explore the possibility of establishing such a registry.[689] They noted that the FCC had considered such a registry and rejected it in 1992 in favor of a company-specific approach that required consumers to tell those companies from which they did not wish to receive calls to place them on the company's "do-not-call" list.[690]

Congress passed the Telemarketing Act three years after the FCC rejected a national registry. As noted in the NPRM, the Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices *and other abusive telemarketing acts or practices*," and specifically mandates that these rules prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[691] Thus, establishment of the national "do-not-call" registry is squarely within the authority granted by the statute.

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[688] *See, e.g.*, Advanta-NPRM at 2; ATA-NPRM at 6-10, 20-21; DMA-NPRM at 16-22; ERA-NPRM at 26-27; MPA-NPRM at 34-38; PMA-NPRM at 25-26. *See also* ARDA-Supp. at 1; ATA-Supp. at 7.

[689] *See, e.g.*, DMA-NPRM at 16-22; ERA-NPRM at 26; MPA-NPRM at 34-38; PMA-NPRM at 25-26.

[690] FCC Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8762-67 (Oct. 16, 1992).

[691] 15 U.S.C. 6102 (a)(1) and (a)(3)(A) (emphasis added).

The goal in both the TCPA and § 6102(a)(3) of the Telemarketing Act is to protect consumer privacy. When Congress directed the FTC to include in the TSR a prohibition against a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, Congress knowingly put the FTC on the same path that the FCC had trod three years earlier, but did not mandate that the two agencies arrive at the identical conclusion. Instead, the Telemarketing Act is written broadly and does not limit how the Commission is to effectuate the Congressional mandate; it leaves the method of achieving the goal of protecting privacy to the Commission's discretion.[692] There is nothing in the TCPA that would lead to the conclusion that the FCC was the only federal agency authorized to create a national registry. In fact, although Congress had passed the TCPA only three years earlier, it mandated in the Telemarketing Act that the FTC promulgate provisions similar to those that the FCC had promulgated pursuant to TCPA. For example, although FCC regulations already restricted the times that telemarketers can call consumers,[693] Section 6102(a)(3)(B) of the Telemarketing Act directed the FTC to also include in its regulations a provision that would prohibit telemarketers from making unsolicited phone calls to consumers during certain hours of the day or night. Thus, Congress clearly intended to provide the FTC with sufficient authority to remedy the problem of

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[692] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3rd ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

[693] 47 CFR 64.1200(e)(1). *See also* discussion at 7 FCC Rcd at 8767-68.

unwanted telemarketing calls by means of a national registry, notwithstanding that the FCC had earlier decided not to exercise its own authority to do so.

Interplay between the national "do-not-call" registry and state "do-not-call" laws. The NPRM specifically requested comment on how the proposed establishment of a national "do-not-call" registry should interplay with similar requirements on the state level.[694] In response, NAAG and representatives of individual states with "do-not-call" laws expressed concern about the possible preemptive effect of a national "do-not-call" registry.[695] On the other hand, industry representatives urged that if, despite their opposition, the Commission adopted TSR provisions establishing a national "do-not-call" registry, the national registry must preempt similar state requirements.[696]

At this time, the Commission does not intend the Rule provisions establishing a national "do-not-call" registry to preempt state "do-not-call" laws. Rather, the Commission's intent is to work with those states that have enacted "do-not-call" registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized "do-not-call" registry system and a single set of compliance obligations.[697] The Commission is actively

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[694] 67 FR at 4539.

[695] *See, e.g.*, NAAG-NPRM at 6-14; Connecticut-NPRM at 3; DC-NPRM at 4-5 (District of Columbia); NYSCPB-NPRM at 13-17 (New York); Texas PUC-NPRM at 3-4.

[696] *See, e.g.*, ATA-NPRM at 28-29; DMA-NPRM at 3, 14; ERA-NPRM at 34.

[697] In this regard, the Commission notes that in September 2002, the FCC published an NPRM to review its TCPA regulations, including, among other things, whether its company-specific "do-not-call" requirement has been effective and whether a national registry would better serve the public interest. *See* FCC TCPA 2002.

consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the "do-not-call" provisions in the amended Rule, the Commission intends to advance that goal. At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.[698]

Implementation of a National Do-Not-Call Registry

In developing an implementation plan for a national "do-not-call" registry, the Commission has been guided by a number of concerns. Most importantly, the Commission has sought to ensure the accuracy and validity of the consumer telephone numbers added to the registry, and to build a system that can handle the potential volume of consumer requests to be placed on the registry.[699] Equally important, the

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[698] *See generally English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (preemption can occur "where it is impossible for a private party to comply with both state and federal requirements, *see, e. g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)."); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); Ass'n of Banks in *Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (where state and federal laws are inconsistent, state law can be pre-empted even if it was enacted to protect its citizens or consumers).

[699] Consumer interest in state "do-not-call" registries has varied from a few percent to over 40 percent of all telephone lines within the state.

system must ensure the security of the information maintained in the registry. The registry also must be easily accessible to both telemarketers and appropriate law enforcement agencies. In addition, the Commission seeks to develop the system with the lowest possible costs.

The Commission conducted extensive research to determine the feasibility of a national "do-not-call" registry and to develop a plan for implementing such a registry. The NPRM asked for comment on a number of specific implementation questions.[700] The staff contacted the states with their own registries, and also contacted many of the contractors used by those states to develop their registries. On February 28, 2002, as part of its research, the Commission issued a Request for Information ("RFI") to contractors capable of assisting the FTC in the development, deployment, and operation of the national registry.[701] Thirty-six different companies responded to the RFI. In August 2002, the Commission issued a Request for Quotes ("RFQ") to selected vendors.[702] A number of those vendors have submitted proposals and quotes to the Commission; the agency is currently evaluating those proposals.[703]

Based on all of the information gathered during this process, the Commission plans to develop a national registry with three components: consumer registration; access to the consumer registration database by telemarketers and sellers; and law enforcement access to both the consumer registration

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[700] 67 FR at 4538-39.

[701] *See* http://www.ftc.gov/procurement.

[702] The Commission issued the RFQ to those vendors that expressed an interest in developing the national registry and that were on General Service Administration ("GSA") schedules to provide goods or services to the federal government.

[703] All vendor responses to both the RFI and RFQ contain confidential proprietary business information and therefore cannot be made public.

database and the list of telemarketers and sellers who have accessed the consumer registration database. The entire system will be fully automated to simplify the process and keep costs to a minimum.

Consumer registration. Consumers will be able to add their telephone numbers to the national "do-not-call" registry through two methods: either through a toll-free telephone call or over the Internet. Consumers who choose to register by phone will have to call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response ("IVR") system. After a brief introductory message, the consumer will be asked to enter on his or her telephone keypad the telephone number from which the consumer is calling. The number entered will be checked against the automatic number information ("ANI") that is transmitted with the call. If the telephone number the consumer enters on the keypad matches the ANI of the line from which the consumer is calling, then the IVR system will inform the consumer that the number is registered and the call will end. If the telephone number does not match, the IVR system will advise the consumer to call back from the telephone the consumer wishes to register. In the small percentage of calls in which ANI is not available, the system will offer other verification options.

Using this process, the Commission will verify, at a minimum, that each consumer is calling from a telephone line assigned the number the consumer is attempting to register. The Commission has determined that this is sufficient verification for the limited purposes involved here—ensuring that a telephone number in the national registry was entered by someone in the household to which that telephone number is assigned. [704] A number of commenters stated that the FTC

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[704] Unlike the Commission's cases challenging the unauthorized billing of goods or services to consumers' telephone numbers based solely on ANI verification, *see, e.g., FTC v. Verity Int'l, Ltd.*, No. 00 Civ. 7422

should prohibit third parties from registering consumers' preferences not to receive telemarketing calls with the national "do-not-call" registry, citing concerns that such third-party registrations could lead to abuse.[705] The Commission agrees that third-party registrations should not be permitted, and believes that the verification procedures to be established for telephone registrations will prevent these potential types of third-party abuse, because the person registering will have to be present physically in the household with which the telephone number being registered is associated.

Other commenters suggested that only the line subscriber or person who is billed for the telephone line be allowed to register that number in the national registry.[706] In fact, one commenter suggested that the FTC should "permit each adult user of the telephone to prevent calls to him or herself, but not to be able to bar all calls to all adults using that telephone."[707] The Commission does not believe this is a realistic approach. Because numerous people in a household often share a common telephone number, the Commission has determined that the decision to be part of the "do-not-call" registry does not rest with the line subscriber (or any

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(LAK) (S.D.N.Y. 2000); *FTC v. American TelNet, Inc.*, No. 99-1587 CIV:KING (S.D. Fla. 1999), the verification process needed to ensure the validity of numbers in the national registry is much less stringent. Here, only the right not to receive unwanted telemarketing calls is being asserted; the line subscriber is not incurring charges for goods and services, possibly purchased by unauthorized third parties, based on ANI information.

[705] *See, e.g.*, DialAmerica-NPRM at 13; Household-NPRM at 13; Texas PUC-NPRM at 2; PMA-NPRM at 29. NAAG also cited recent state cases against companies that have deceptively offered to add consumers' numbers, for a fee, to "do-not-call" lists. *See* NAAG-NPRM at 19, n.47.

[706] *See, e.g.*, DialAmerica-NPRM at 13; Nextel-NPRM at 26.

[707] AFSA-NPRM at 8.

single resident) alone. In such a shared-number situation, the privacy rights of all are affected by unwanted telemarketing calls. Thus, the decision to register the household telephone number in the national registry is a joint decision of all household members. The Commission's telephone Registration system will accept the registration from any member of the household, but will remind consumers that they are registering on behalf of all household members.[708]

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[708] Several commenters supported allowing any household member to register the household telephone number. *See*, e.g., NCL-NPRM at 9 (allow registration requests to be made by the line subscriber, spouse, roommate, care giver, or others with a legitimate interest). One telemarketer that calls on behalf of non-profit organizations opposed this view, commenting that "each person has an individual, separate constitutional right to speak and be in association with other like-minded people, and the groups to which they belong also have the right to contact their members and the public at large. When dealing with fully protected, non-commercial speech, any do-not-call list that keeps track only of numbers, rather than names and numbers, needs some way to be certain that everyone who is lawfully and regularly reached at a telephone number has consented to be cut off from the organizations to which they belong." Hudson Bay-Goodman-NPRM at 13 (emphasis omitted). As an initial matter, non-commercial speech is not covered by the national "do-not-call" provisions of the amended Rule. *See* amended Rule § 310.6(a) (exempting solicitations to induce charitable contributions via outbound telephone calls from § 310.4(b)(1)(iii)(B) of the Rule). Moreover, the Commission has determined that to accomplish its privacy protection objectives, there is no workable alternative to allowing any member of a household to exercise the "do-not-call" rights of the entire household using a shared telephone number. Households in which one member wants to sign up with the national "do-not-call" registry and another does not have the option of subscribing to an additional telephone line that is not on the registry and may therefore receive telemarketing calls, or they can provide express authorization to specific entities to receive telemarketing calls from them, regardless of their national registry status, pursuant to § 310.4(b)(1)(iii)(B)(i) of the amended Rule. The Commission notes that the "do-not-call" provisions will not "cut off" individuals from organizations or sellers because it will not foreclose other means of communication with any member of the household, such as by

Consumers who choose to register via the Internet will go to a website dedicated to the registration process, where they will be asked to enter the telephone number they wish to register. Consumers will be told that they may register only their household or personal telephone number(s). As with the telephone registration system, they will be reminded that if they share a household number with others, they are registering on behalf of all household members. The Commission is considering two possible methods for verifying consumers' information. One possible option is that a consumer will be asked to enter certain address information, such as his or her zip code and the numeric portion of his or her street address, which the system would then check against a national database to ensure that it matches the telephone number provided. The second possible option is that the consumer will be asked to enter his or her email address; the system will send a confirming email to that address, and the consumer will then have to respond to reconfirm his or her registration decision.

The Commission will use one or both of these verification methods for Internet registrations. Such verification processes will enhance the likelihood that individuals will register their own telephone numbers. If the email verification process is used, the Commission will also develop procedures to prevent

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conventional mail, email, or door to door solicitation. The "do-not-call" provisions are strongly analogous to laws requiring solicitors to honor a "no solicitation" sign posted by a homeowner, which the Supreme Court has approved in such cases as Martin v. Struthers, 319 U.S. 141 (1941), involving "a form of regulation . . . which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." According to the Court, "[t]his or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." *Id.* at 148.

large numbers of registrations from being confirmed through the same email account. Once again, the Commission has determined that these are sufficient verification procedures for the limited purpose of adding telephone numbers to the national "do-not-call" registry, and should help prevent the potential abuses cited concerning massive third-party registrations.

For both telephone and Internet registrations, the only personal identifying information that will be maintained by the national "do-not-call" registry will be the consumer's telephone number. Based on our discussions with the states, that appears to be the only piece of information that is needed by telemarketers.[709] Moreover, the Commission has determined that it has no need for consumer names or addresses in the registry.[710] Thus, the Commission will not collect that information.

Consumers will be able to verify or cancel their registration status using either the telephone or Internet. The same verification procedures established for the initial registration will apply to these requests as well. Allowing consumers to verify their registration status and to cancel their registrations

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[709] In fact, based on discussions between the states and the Commission staff, it appears that in states where additional information is provided to telemarketers, the states have received requests to strip their lists of all information except the telephone number.

[710] Some commenters stated that the Commission would have to collect consumers" names, addresses and telephone numbers for the national registry to remain accurate. *See*, e.g., NAA-NPRM at 12; Household-NPRM at 13. Another stated that to keep the registry accurate, "the Commission must be prepared to accept a data stream from every local exchange carrier in the country on a daily basis." SBC-NPRM at 11. The Commission has learned that this is not necessarily true. National databases with sufficient accuracy that contain only telephone numbers now exist, permitting the Commission to purge a telephone number from the national registry when that number is disconnected or the party in whose name the number is registered changes.

if they so wish offers yet another method to enhance the accuracy of the national registry.

The Commission has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned. The Commission wishes to minimize the inconvenience to consumers entailed in periodically re-registering their preference not to receive telemarketing calls.[711] However, the Commission is also aware that the length of time registrations remain valid directly affects the overall accuracy of the national registry.[712] A number of

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[711] Consumer inconvenience includes not just their time and effort necessary to register, but also their need to remember when it is time to re-register. Of course, requiring frequent consumer re-registrations also increases the costs of operating the national registry. Several commenters supported allowing registrations to continue indefinitely, until the consumer's phone number is disconnected or he requests that his number be removed. *See*, e.g., New Orleans at 9; NCL at 9. In addition, 14 states with "do-not-call" registries do not specify a renewal period for registrations in their "do-not-call" statutes (Alabama, Alaska, California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, and Tennessee).

[712] Commenters citing this concern over the accuracy of the national registry reached various conclusions concerning the time period for which registrations remain should remain valid. Some suggested registrations remain valid for only one year. *See* DialAmerica-NPRM at 13; NCTA-NPRM at 16; Nextel-NPRM at 26. Others stated that registrations should remain valid for two years, unless the Commission can ensure greater accuracy through some purging process. *See* NRF-NPRM at 18; PMA-NPRM at 29. Still others suggested that a five-year registration period is sufficient. *See* NAAG-NPRM at 18; Household-NPRM at 13. State registration periods vary from one year to five years, while, as stated in the previous footnote, fourteen states impose no expiration on consumer registrations. Three states require consumers to renew their registration annually (Arkansas, Florida, and Oregon) Two states (Georgia and Wisconsin) have a two-year registration, and two others (Texas and Idaho) have registrations that are good for three years. Six states require

commenters stated that 16 percent of all telephone numbers change each year, and that 20 percent of all Americans move each year.[713] Unless the system includes a process to counteract this effect, numbers in the national registry that have been disconnected and then reassigned to other line subscribers would remain in the registry even though those line subscribers to whom the numbers are reassigned may not object to receiving telemarketing calls. To guard against this possibility, the system will include a procedure to periodically check all telephone numbers in the national registry against national databases, and those telephone numbers that have been disconnected or reassigned will be purged from the registry. This procedure will help maintain the accuracy of the national registry, while limiting the number of times consumers must go through the registration process.[714] The Commission believes that a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers.

Access to consumer registration information. To comply with the amended Rule's "do-not-call" provisions, telemar-

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consumers to re-register after five years (Connecticut, Illinois, Kansas, Maine, Vermont, and Wyoming).

[713] *See* DMA-NPRM at 12; Nextel-NPRM at 26; Household-NPRM at 13; SBC-NPRM at 11. Of course, not all consumers who move change their telephone numbers. For consumers who keep their existing telephone numbers when they move, no action by either the consumer or the Commission is necessary to maintain the registry's accuracy.

[714] The DMA TPS is operated in a similar manner. TPS registrations remain valid for five years. During that five-year period, the DMA checks the information in the TPS against the U.S. Postal Service's National Change of Address List, purging the telephone numbers of those registered consumers who have moved. DMA-NPRM at 7, 12.

keters and sellers must gain access to the telephone numbers in the national registry so that they can "scrub" their call lists to eliminate the telephone numbers of consumers who have registered a desire not to be called. For the telemarketer and seller access component of the registry, the Commission plans to develop a fully-automated, secure website dedicated to providing this information to telemarketers and sellers. The first time a telemarketer or seller accesses the system, the company will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.

The only consumer information telemarketers and sellers will receive from the national registry is the registrants' telephone numbers. Those telephone numbers will be sorted and available by area code. Telemarketers and sellers will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state or region of the country. Of course, telemarketers and sellers will also be able to access the entire national registry, if desired.

When a seller or telemarketer first submits an application to access registry information, the company will be asked to specify the area codes that they want to access.[715] Each company accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the company accesses.[716] Fees will be payable

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[715] They will be able to amend the list of area codes for which they seek data on future visits, provided they pay the appropriate fee for the additional area codes.

[716] On May 29, 2002, the Commission issued a Notice of Proposed Rulemaking to add a new section 310.9 to the Rule, which would establish a "user fee" for telemarketer access to the national do-not-call registry. 67 FR. 37362. After reviewing the comments received in

via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the telemarketer or seller to wait approximately one day for the funds to clear before data access will be provided).

After payment is processed, the telemarketer or seller will be given an account number and permitted access to the appropriate portions of the registry. That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, telemarketers and sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit. Telemarketers and sellers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid. As indicated in the discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or a telemarketer to employ a version of the "do-not-call" registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

Law enforcement access to the registry. Any law enforcement agency that has responsibility to enforce either the Rule or any state do-not-call statute or regulation will be permitted to access appropriate information in the national registry. This information will be provided through a secure Internet website, with access obtained through the Commission's existing Consumer Sentinel[reg] system. Law enforcers will be able to query the registry to determine if and when a

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response to that NPRM, the Commission has decided that it will issue a revised NPRM seeking additional comment on the fee issue in the near future. Section 310.8 of the amended Rule has been reserved for the fee section.

particular telephone number was registered by a consumer. They will also be able to query if and when a particular telemarketer or seller accessed the registry, and the information accessed by that telemarketer or seller. Such law enforcement access to data in the national registry is critical to enable state Attorneys General and other appropriate law enforcement officials to gather evidence to support enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act,[717] and, as discussed below, once harmonization between the national registry and state do-not-call programs has been completed, to support law enforcement action under state law as well.

Harmonization of various do-not-call registries. As discussed above, the Commission is working with the states to develop a single, national "do-not-call" registry. The Commission envisions allowing consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency. In addition, the Commission anticipates allowing telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose.

To further those goals, the Commission will allow all states, and the DMA if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received.

It will take some time to achieve these goals completely, however. Some states will be able to transfer their state "do-not-call" registration information, and will cease requiring telemarketers to access the state registries, by the time

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[717] 15 U.S.C. 6101 *et seq.*

telemarketers first gain access to the national registry. For other states, it may take from 12 to 18 months to achieve those results. At least one state, Indiana, may need up to three years before it can become part of the national system. In any event, the Commission will continue to work diligently with the states in an effort to harmonize these different systems.

Implementation time line. As stated above, the Commission has issued an RFQ to vendors to develop and operate a national "do-not-call" registry. The implementation time line for the registry begins on the date the contract is awarded to a vendor in response to that RFQ. The Commission anticipates awarding the contract as soon as the agency receives appropriate authority and funding from Congress to begin building the national registry.

Consumers will be allowed to begin to register their preference not to receive telemarketing calls approximately four months after a contract for the national "do-not-call" registry is awarded. To avoid an unmanageable surge of calls when the national registry is initially opened, the Commission anticipates phasing in registry availability to consumers one geographic region at a time throughout the United States over a period of approximately two months. Telemarketers and sellers will be given access to the telephone numbers in the national registry approximately six months after the contract is awarded. The effective date for the "do-not-call" provisions of the amended Rule will be approximately seven months after the date the contract to develop and implement the system is awarded. Thus, to comply with the amended Rule, telemarketers will need to obtain the list of registered telephone numbers during the sixth month after the contract is awarded, allowing themselves sufficient time to scrub their calling lists before placing outbound telemarketing calls in the seventh month after the date the contract is awarded.

As stated below in the Effective Date section, in the future the Commission will announce the date by which full

compliance with the national "do-not-call" registry provisions of the amended Rule will be required. As noted elsewhere in this document, full compliance with all other provisions of the amended Rule—with the exception of the Caller ID provision (§ 310.4(a)(7))—will be required by the date on which the amended Rule is effective, March 31, 2003. Full compliance with the Caller ID provisions will be required by January 29, 2004.

§ 310.4(b)(1)(iv)—Abandoned calls & § 310.4(b)(4) —Safe harbor for abandoned calls

In the NPRM, the Commission explained that "abandoned calls" violate § 310.4(d) of the original Rule because such calls failed to provide the requisite prompt disclosures.[718] In providing this explanation, the Commission noted that "abandoned calls" include two distinguishable scenarios: "hang up" calls, in which telemarketers hang up on consumers whom they have called without speaking to them; and "dead air" calls, in which there is a prolonged period of silence between the consumer's answering a call and the connection of that call to a sales representative.[719] The record shows that both types of abandoned calls arise from the use of predictive dialers, which promote telemarketers' efficiency by calling multiple consumers for every available sales representative.[720] Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the amount of time representatives spend waiting to reach a prospective customer.[721] An inevitable "side effect"

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[718] 67 FR at 4524.

[719] 67 FR at 4522.

[720] ABA-NPRM at 12; ATA-NPRM at 32; CADM-NPRM at 3; DialAmerica-NPRM at 22; Pelland-NPRM at 2; Sytel-NPRM at 3; Miller Study at 13; http:// www.predictive-dialers.com/home/faq.html.

[721] ATA-NPRM at 31; ERA-NPRM at 41; MPA-NPRM at 31; NAA-NPRM at 14; Private Citizen-NPRM at 3; PMA-NPRM at 30; TeleDirect-NPRM at 2.

of predictive dialers' functionality is that the dialer will reach more consumers than can be connected to available sales representatives.[722] In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.[723]

According to one consumer organization, the Rule's prohibition on abandoned calls as set forth in the NPRM addresses "one of the most invasive practices of the telemarketing industry."[724] "Hang up" calls and "dead air" frighten consumers,[725] invade their privacy,[726] cause some of them to struggle to answer the phone only to be hung up on,[727] and waste the time and resources of consumers working from home.[728]

The amended Rule prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting. (As explained herein, "hang up" calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Rule.) The Commission's prohibition of abandoned calls is

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[722] June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

[723] NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

[724] PRC-NPRM at 3.

[725] 67 FR at 4523.

[726] AARP-NPRM at 9.

[727] 67 FR at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

[728] PRC at 3.

authorized by § 6102(a)(3)(A) of the Telemarketing Act, which directs the Commission to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the Commission to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the Commission to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

Section 310.4(b)(4), the amended Rule's safe harbor provision, provides that the Commission will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of § 310.4(b)(1)(iv) if the seller or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message; and (4) the seller or telemarketer must retain records, in accordance with § 310.5(b)-(d), establishing compliance with § 310.4 (b)(4)(i)-(iii).

Telemarketers voiced strong objection to the NPRM discussion of abandoned calls as violative of § 310.4(d),[729] and argued that this interpretation would in effect ban the use of predictive dialers,[730] causing the loss of efficiency benefits that arise from the use of predictive dialers.[731] The Commission is mindful of the benefits of increased efficiency, but believes that the increased efficiency of predictive dialers must be balanced against the abusive nature of abandoned calls. The abuses of abandoned calls were delineated in the NPRM and elsewhere in the record.[732] As NAAG asserted at the June 2002 Forum, an abandoned call is basically a "prank call."[733] However, the Commission is

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[729] ABA-NPRM at 12; ACA-NPRM at 9; ATA-NPRM at 30; Associations-NPRM at 3; Capital One-NPRM at 6; DialAmerica-NPRM at 24-25; DMA-NPRM at 44; ERA-NPRM at 40-41; Gannett-NPRM at 4; Infocision-NPRM at 6-7; Metris-NPRM at 10; MPA-NPRM at 29-30; NAA-NPRM at 13, 15; Time-NPRM at 11; Tribune-NPRM at 9.

[730] June 2002 Tr. I at 211 (CCC); ABA-NPRM at 12; Advanta-NPRM at 4; Aegis-NPRM at 5; AFSA-NPRM at 16; Capital One-NPRM at 6; Gannett-NPRM at 4; Household Auto-NPRM at 12; ICT-NPRM at 2; PMA-NPRM at 30; PCIC-NPRM at 2; VISA-NPRM at 12; Miller Study at 14. But *see* EPIC-NPRM at 23.

[731] ACA-NPRM at 8-9; ARDA-NPRM at 15; ANA-NPRM at 6; ATA-NPRM at 31; BofA-NPRM at 9; BRI-NPRM at 3; Discover-NPRM at 6; Fleet-NPRM at 6; FPIR-NPRM at 2; Household Auto-NPRM at 11-12; ICT-NPRM at 2; ITC-NPRM at 2-3; KeyCorp-NPRM at 6; Marketlink-NPRM at 3; MPA-NPRM at 8; NAA-NPRM at 14; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; SHARE-NPRM at 4; Synergy Solutions-NPRM at 4; Technion-NPRM at 5; TeleDirect-NPRM at 2; Teleperformance-NPRM at 3; TRC-NPRM at 4; TeleStar-NPRM at 2; Time-NPRM at 10; Allstate-Supp. at 2; Miller Study at 15. *See* also Citigroup-NPRM at 10; IMC-NPRM at 7 (Predictive dialers enhance dialing accuracy); NAA-NPRM at 7 (Predictive dialers help with "do not call" compliance).

[732] 67 FR at 4522-24; AARP-NPRM at 9; NAAG-NPRM at 47; NACAA-NPRM at 10; PRC-NPRM at 3.

[733] June 2002 Tr. II at 27 (NAAG). *See* also NAAG-NPRM at 47; McKenna-Supp. at 2.

persuaded that a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers. At the June 2002 Forum, one telemarketing group posited that consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices.[734] Therefore, taking into account the record as a whole, and arguments raised by both sides of this issue, the Commission has determined to prohibit abandoned calls from continuing without regulation, and has created requirements that, in effect, closely govern the use of predictive dialers. Under this approach, consumers will benefit from a substantial reduction in the number of abandoned calls they receive,[735] but telemarketers will not be deprived of a large part of the efficiency benefits that accrue from the use of predictive dialers.[736] The Commission also notes that the amended Rule's establishment of a national "do-not-call" registry should significantly reduce the number of calls received by consumers who place their numbers on the registry, thereby reducing the number of abandoned calls these consumers must contend with as well.

"Abandoned call": Section 310.4(b)(1)(iv) of the amended Rule defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. This definition of abandoned call covers "dead air" and "hang up" calls, in which the telemarketer hangs up on a called

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[734] June 2002 Tr. I at 212-13 (CCC). But *see* June 2002 Tr. I at 222-23 (EPIC).

[735] AFSA-NPRM at 16; Sytel-NPRM at 7-8.

[736] *See* KeyCorp-NPRM at 6; PCIC-NPRM at 2.

consumer without connecting that consumer to a sales representative. This approach to abandoned calls clarifies several issues raised by telemarketers in the record.

The amended Rule removes any possibility of doubt that a call placed by a telemarketer is an outbound telephone call within the meaning of the Rule, even if the telemarketer hangs up on the called consumer without speaking to him or her, or subjects the called consumer to dead air. The Rule's disclosure requirement is triggered once a recipient of a telemarketing call answers the phone.[737] This approach is consistent with the treatment of this issue in the NPRM.[738] The Commission rejects the argument, advanced by ACA, ATA, DMA, and ERA, that abandoned calls cannot be regulated by the Rule because they are not "outbound telephone calls."[739] If this theory were valid, telemarketers could abuse consumers in a variety of ways without violating the Rule as long as they did not also engage in a sales pitch.

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[737] The safe harbor, which, among other things, directs how long telemarketers must allow a called consumer's telephone to ring before disconnecting the call, addresses telemarketers' practices before the consumer answers the phone.

[738] 67 FR at 4524.

[739] ACA-NPRM at 9-10; ATA-NPRM at 30; DMA-NPRM at 43-44; ERA-NPRM at 40. DMA, ERA, and PMA argued that the FTC lacks authority to regulate telemarketers' use of predictive dialer technology. [*See* DMA-NPRM at 4, 42-48; ERA-NPRM at 38-40; PMA-NPRM at 29-30.] Specifically, DMA, ERA, and PMA argued that the FCC has authority to regulate automatic telephone dialing systems through the TCPA. But nothing in the TCPA limits the authority of the FTC under the Telemarketing Act. The Rule's regulation of abandoned calls falls squarely within the FTC's authority to regulate abusive telemarketing acts or practices under the Telemarketing Act. As the Commission stated in the NPRM, the harm to consumers that arises from abandoned calls is very real and falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. [*See* 67 FR at 4524.] The Commission therefore rejects the argument offered by DMA, ERA, and PMA that it lacks the legal authority to address call abandonment in the TSR.

That interpretation and that result are contrary to the overall purpose and intent of the Telemarketing Act and plainly at odds with the Rule's definition of "outbound telephone call" and with the Rule generally. A telemarketer initiates a telephone call by causing the called consumer's telephone to ring. Abandoning the call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice. Certainly this is the type of practice that prompted Congress, in the Telemarketing Act, to direct the Commission to prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[740] The record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.[741]

ATA, in its comment and at the June 2002 Forum, requested guidance from the Commission on how "abandoned call" would be defined in the Rule.[742] Accordingly, the Commission has clarified, in § 310.4(b)(1)(iv), that an outbound call is "abandoned" if, once answered by a consumer, it is not connected to a sales representative within two seconds of the consumer's completed greeting (i.e., no more than two seconds of "dead air").[743] As was explained above, this definition of "abandoned call" also includes situations in which the telemarketer hangs up on a consumer who has answered the telemarketer's call without connecting that call to a sales representative.

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[740] 15 U.S.C. 6102(a)(3)(A).

[741] AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. *See also* Pelland-NPRM at 2.

[742] ATA-NPRM at 34; June 2002 Tr. II at 38 (ATA). *See* also Convergys-NPRM at 6; MPA-NPRM at 32-33.

[743] DialAmerica-NPRM at 19; Sytel, Outbound Focus Issue 16, http://www.outboundfocus.com.

Abandoned call "safe harbor": The abandoned call safe harbor consists of four components, each of which is supported by record evidence. A seller or telemarketer will not be deemed to have violated § 310.4(b)(1)(iv) by abandoning calls, provided that the seller or telemarketer can show that its conduct conforms to the standards specified in this safe harbor.

Under the first subsection of the safe harbor, the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by called consumers. The safe harbor's three percent abandonment rate is measured per day per calling campaign. The "per day per campaign" unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment.[744] Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.

What constitutes an "acceptable" abandonment rate was the subject of substantial comment on the record. A number of telemarketers urged the Commission to alter the position implied in the NPRM that the appropriate standard is a zero percent abandonment rate.[745] Among industry representatives who advanced this argument, ATA took the most extreme

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[744] FN744 *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38. *See also* MBNA-NPRM at 8. But see ATA-NPRM at 35: Commenter advocated a unit of measurement incorporating "a broad period of time" to allow for variances in abandonment rates caused by such factors as the time of day a call is placed; ERA-NPRM at 44; MPA-NPRM at 30, 32; NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 24.

[745] DialAmerica-NPRM at 24; NAA-NPRM at 15; PMA-NPRM at 31.

position, arguing against any regulation of abandonment rates.[746] The Commission rejects this position in light of the record of conduct affiliated with abandoned calls and predictive dialers under the current regulatory scheme.[747] Other industry comments recommended that the Commission set a "reasonable" or "acceptable" abandonment rate above zero percent that would curb abuses while allowing use of predictive dialers to continue.[748] A third group of telemarketers argued that the Commission's abandonment rate should be consistent with DMA's current guideline, which calls for an abandonment rate no higher than five percent.[749] Consumer groups and law enforcement representatives advocated strongly for a zero abandonment rate.[750]

Taking all of these viewpoints into account, the Commission has concluded that neither extreme strikes the right balance on this issue. The Commission believes that a maximum abandonment rate of three percent strikes a reason-

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[746] ATA-NPRM at 33; ATA-Supp. at 14. *See* also TeleDirect-NPRM at 2.

[747] 67 FR at 4522-23. In the present environment, telemarketers have engaged in predictive dialer practices that frighten, disturb, and aggravate consumers. *See*, e.g., June 2002 Tr. II at 17-18 (AARP); June 2002 Tr. II at 21 (NAAG); June 2002 Tr. II at 22 (DialAmerica).

[748] BofA-NPRM at 9; Citigroup-NPRM at 10; ITC-NPRM at 3; KeyCorp-NPRM at 6; MasterCard-NPRM at 13; Time-NPRM at 11.

[749] http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38; ABA-NPRM at 12; AFSA-NPRM at 16; ARDA-NPRM at 16; CBA-NPRM at 10; Citigroup-NPRM at 10; Discover-NPRM at 6; ERA-NPRM at 43; MPA-NPRM at 8, 32-33; June 2002 Tr. II at 24 (ERA). *See* also NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 22-23; MPA-Supp. at 6, 23; NAA-Supp. at 2; Miller Study at 2. But see NASUCA-NPRM at 14; Tribune-NPRM at 9.

[750] EPIC-NPRM at 22-23; NAAG-NPRM at 47; NASUCA-NPRM at 14; NCL-NPRM at 11; PRC-NPRM at 3; Private Citizen-NPRM at 4; June 2002 Tr. I at 220 (Junkbusters). *See also* Horick-NPRM at 1; McKenna-Supp. at 2. But *see* McClure-NPRM at 1.

able balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers. Two telemarketers essentially supported this abandonment rate as being "feasible, realistic" and "fully capable" of being achieved.[751] ATA asserted that the three percent standard would result in "a significant drop in efficiency" among some of its members.[752] Sytel, a leading provider of predictive dialer technology, urged the Commission not to set a rate below three percent to allow for continuing use of predictive dialers.[753] The three percent standard is also consistent with the California Public Utilities Commission's Interim Opinion regarding predictive dialer use and abandoned calls.[754]

The second component of the abandoned call safe harbor addresses "ring time" or "early hang ups." According to Sytel, some telemarketers using predictive dialers may disconnect calls to consumers after allowing the phone to ring for only a very short period of time before hanging up, without giving consumers a reasonable opportunity to answer the phone; these disconnected calls are not considered "abandoned" by predictive dialers.[755] Employing a short "ring time" is yet another way for telemarketers to maximize the

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[751] PCIC-NPRM at 2; Aegis-NPRM at 5. *See also* ARDA-Supp. at 1: "A rate between three and five percent is reasonable."

[752] June 2002 Tr. II at 49 (ATA). *See also* ATA-Supp. at 15; Associations-Supp. at 6-7; ERA-Supp. at 23; MPA-Supp. at 23; NAA June 28-Supp. at 2.

[753] June 2002 Tr. II at 53 (Sytel).

[754] CPUC Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20. The CPUC concluded that, based on comments it had received in its rulemaking process, "most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum reprogramming effort."

[755] Sytel-NPRM at 4; Sytel, Outbound Focus Issue 16, http:// www.outboundfocus.com.

efficiency of their sales representatives; the predictive dialer calls many more consumers than the telemarketer can handle to minimize the chance that a sales representative will remain idle.[756] This kind of call is abusive of a consumer's right to privacy, as consumers' lives at home are interrupted without any benefit or purpose whatsoever. One runs to the phone only to have it stop ringing before one can pick it up; or answers it only to find no one there. Surprisingly, one commenter, MPA, actually argued in favor of allowing telemarketers to hang up after one ring if no sales representatives were available to handle the call.[757] Sytel recommends that the Commission follow DMA guidelines on predictive dialers, which recommend allowing the phone to ring at least four times or for twelve seconds before disconnecting the call.[758] Sytel stated that the practice of "early hangups" is widespread, and it urged the Commission to set a "ring time" standard that allows consumers a reasonable length of time to answer the phone.[759] The Commission has concluded that a modified version of the DMA guidelines presents a reasonable approach. Under this part of the safe harbor, telemarketers must let the phone ring either four times or for fifteen seconds before disconnecting the call.[760] This ring time standard will give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted

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[756] Private Citizen-NPRM at 3.

[757] June 2002 Tr. II at 25 (MPA).

[758] Sytel-NPRM at 4; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38.

[759] Sytel-NPRM at 4.

[760] According to Sytel, the 15-second standard has been adopted by the United Kingdom DMA. Outbound Focus Issue 16, http://www.outboundfocus.com.

by ringing phones with no caller present on the other end of the line.

The third component of the abandoned call safe harbor requires telemarketers to play a recorded message whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting. The silence that consumers face when the sales representative is unavailable and does not respond after the consumer says, "hello", is "dead air."[761] The recorded message will significantly mitigate the problems associated with "dead air" by identifying the caller responsible for the extended silence.

According to the record amassed in this proceeding, dead air is an unavoidable feature of predictive dialers.[762] Some dead air in telemarketing calls is caused by answering machine detection ("AMD"): consumers are met with silence as the dialer determines whether the call was answered by a person or an answering machine.[763] Dead air also results when the dialer waits for a sales representative to become available to speak with the called consumer.[764] Sytel argued in favor of setting a maximum dead air standard of two seconds.[765] DMA's predictive dialer guidelines also set a two second maximum for dead air.[766] This standard is consistent

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[761] ARDA-NPRM at 15.

[762] Sytel, Outbound Focus Issue 16, http://www.outbound.focus.com; Sytel-NPRM at 4-5. *See also* ATA-NPRM at 34; Cendant-NPRM at 9; DMA-NPRM at 42.

[763] DialAmerica-NPRM at 19-20; Private Citizen-NPRM at 3; Sytel-NPRM at 4-5; Time-NPRM at 10.

[764] ARDA-NPRM at 15; DialAmerica-NPRM at 20-21; Sytel-NPRM at 4.

[765] Sytel-NPRM at 5-6.

[766] *See* http://www.the-dma.org/library/guidelines/dotherightthing.shtml #38. But see ATA-Supp. at 14 (supporting a four-second dead air standard); ERA-Supp. at 25, MPA-Supp. at 23 (Commenters' proposed definition of "abandoned call" has no dead air time limit).

with the recent CPUC Interim Opinion governing predictive dialers.[767] Based on the record established on this issue—that use of predictive dialers inevitably entails some dead air and that two seconds of dead air allows predictive dialers to impart significant efficiencies—the amended Rule provision allows two seconds of dead air before a call answered by a consumer will be considered "abandoned."

Consumers on the receiving end of dead air may wonder if "someone is waiting to get into my home when I'm away, or . . . determining when I'm home alone."[768] The Commission believes it is not so much the pause that frightens consumers, it is the silence. By playing a recorded message giving the name and telephone number of the seller responsible for the call, the fear generated by telemarketers' dead air is substantially mitigated, and telemarketers are able to continue using predictive dialer technology.[769]

The "recorded message" component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device.[770] The Rule specifies that tele-

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[767] CPUC Interim Opinion at 11-12.

[768] AARP-NPRM at 9.

[769] ARDA-NPRM at 15-16; Household Auto-NPRM at 12; NACAA-NPRM at 10; PCIC-NPRM at 2; TeleDirect-NPRM at 3; Texas PUC-NPRM at 5.

[770] *But see* Kans. Rev. Stat. 50-670(b)(6), which does not distinguish between the two.

marketers must connect calls to a sales representative rather than a recorded message.[771]

The record reflects a range of views regarding the prospect of using recorded messages in telemarketing. A consumer advocacy group, a law enforcement body, and some telemarketers expressed support for recorded messages as a way to mitigate the abuses arising from dead air.[772] Others opposed requiring the use of recorded messages.[773] DMA opposed it based on the assumption that telemarketers' messages would need to include all of the prompt disclosures required by § 310.4(d).[774] DMA noted that recorded messages containing these disclosures could violate the TCPA.[775] Time similarly opposed it based on concern for requiring the recorded message to include the prompt disclosures and, in addition, posited that consumers would not support receiving recorded-message disclosures on their answering machines.[776] The Commission's approach to the recorded message

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[771] This comports with the CPUC Interim Opinion governing predictive dialers, DMA's guidelines for predictive dialers, and Sytel's recommended approach. See CPUC Interim Opinion at 10-12; http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38; Sytel-NPRM at 3.

[772] AARP-NPRM at 9; ARDA-NPRM at 15; BofA-NPRM at 9; CADM-NPRM at 1; Household Auto-NPRM at 12; PCIC-NPRM at 2; Texas PUC-NPRM at 5. *See also* McClure-NPRM at 2. *But see* MasterCard-NPRM at 13.

[773] DMA-NPRM at 44; EPIC-NPRM at 24; Time-NPRM at 11; Worsham-NPRM at 5.

[774] DMA-NPRM at 44. *See also* Capital One-NPRM at 6-7; NASUCA-NPRM at 13-14; NCL-NPRM at 11; Private Citizen-NPRM at 4.

[775] DMA-NPRM at 44. *See also* Sytel-NPRM at 6; Worsham-NPRM at 5.

[776] Time-NPRM at 11. *See also* ANA-NPRM at 6; Associations-NPRM at 3.

component of this safe harbor should allay these concerns.[777] The recorded message need not include all required prompt disclosures; rather, the message need contain no more than the seller's name and telephone number.[778] Of course, it must comply with applicable state and federal laws governing the use of recorded messages, such as the FCC's TCPA regulations. Moreover, telemarketers are not required to leave a recorded message on the answering machines of consumers who are not home to answer the telemarketer's call. In light of the limited nature of the elements of the recorded message component of the safe harbor, the Commission's approach also resolves Sytel's caution against allowing the use of recorded messages without regulation.[779]

The fourth component of the abandoned call safe harbor is a recordkeeping requirement. Specifically, telemarketers using predictive dialers under this safe harbor must keep records documenting compliance with the first three components of this safe harbor in a manner that is in accordance with the recordkeeping requirements of the Rule set out in § 310.5(b)-(d). The record clearly establishes the need for this requirement. According to statements at the June 2002 Forum, some telemarketers routinely exceed DMA's recommended maximum abandonment rate of five percent.[780] At the June 2002 Forum, DMA explained that enforcement of its guideline was difficult despite receiving complaints.[781] The

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[777] Capital One-NPRM at 6-7.

[778] When consumers receive this information, they will not have to wonder whether the call has been placed by someone with sinister motives, as described by AARP. *See* AARP-NPRM at 9; ATA-Supp. at 11.

[779] Sytel-NPRM at 6.

[780] June 2002 Tr. II at 29 (ATA); June 2002 Tr. II at 45 (DialAmerica); June 2002 Tr. II at 52 (Sytel). *See also* Capital One-NPRM at 6; DialAmerica-NPRM at 23; NASUCA-NPRM at 14; Sytel-NPRM at 7.

[781] June 2002 Tr. II at 51 (DMA).

Commission foresees that, absent recordkeeping requirements, the Commission would encounter similar difficulty in enforcing this aspect of the amended Rule. Furthermore, the record does not contain opposition to a recordkeeping requirement associated with the use of predictive dialers, and the records required by the Commission in this provision of the Rule are similar to those supported by industry representatives in the CPUC's predictive dialer rulemaking proceeding.[782] The Commission believes that predictive dialer technology can capture and preserve abandonment rate records as a matter of routine;[783] records showing compliance with the ring time and recorded message requirements will not impose a significant burden on telemarketers who wish to take advantage of this safe harbor.

§ 310.4(b)(2)—Restrictions on use of list

Section 310.4(b)(1)(iv) of the proposed Rule prohibited any seller or telemarketer from selling, purchasing, or using a seller's "do-not-call" list for any purpose other than com plying with the Rule's "do-not-call" provision. The amended Rule retains the provision but modifies the language to also prohibit the sale, purchase, rental, lease, or use of the national registry maintained by the Commission for any purpose other than compliance with the Rule's "do-not-call" provision or otherwise to prevent telephone calls to telephone numbers on either the sellers' lists or the national registry.

Those commenters who addressed this provision supported such a prohibition.[784] NCL stated that, since consumers who sign up for a "do-not-call" list are seeking to preserve their privacy, it would be an invasion of their privacy to use any

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[782] CPUC Interim Opinion at 20-22.

[783] TeleDirect-NPRM at 2.

[784] *See, e.g.*, AARP-NPRM at 3; EPIC-NPRM at 16; NCL-NPRM at 8-9; NYSCPB-NPRM at 6-7; Texas PUC-NPRM at 1-2; Verizon-NPRM at 5. *See also* June 2002 Tr. I at 215-25.

information that would identify those consumers (*e.g.*, names or telephone numbers) for any purpose other than to ensure that those individuals do not receive unsolicited telemarketing calls.[785]

In addition to expanding the provision to cover the sale, purchase, rental, lease, or other use of the registry, the amended Rule has made this prohibition a separate and distinct abusive practice. In the proposed Rule, this provision was part of § 310.4(b)(1), which sets out prohibited practices by telemarketers, including adherence to the "do-not-call" provision. Section 310.4(b)(1) also prohibited sellers from causing telemarketers to engage in the prohibited practices. However, the Commission believes that it is important for all persons, not just sellers and telemarketers, to use the "do-not-call" lists properly. Therefore, the amended Rule retains this provision, renumbered as § 310.4(b)(2), but extends the prohibition to "any person," in order to prohibit all entities, not just sellers and telemarketers, from misusing "do-not-call" lists. By extending the prohibition to "any person," the Commission intends that the provision apply to such parties as list brokers and other entities that do not fall within the definitions of "seller" or "telemarketer." In addition, the amended Rule adds a provision that permits a person to use either seller-specific lists, or the national registry, not only to comply with the "do-not-call" provisions of the Rule, but also "to prevent telephone calls to telephone numbers on such lists." This provision will permit an entity not subject to the amended Rule for whatever reason (e.g., because it is outside of the Commission's jurisdiction) to access the national registry in order to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls.

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[785] NCL-NPRM at 8-9.

§ 310.4(b)(3)—Safe harbor for "do-not-call"

Section 310.4(b)(3) provides sellers and telemarketers with a limited safe harbor from liability for violating the "do-not-call" provision found in § 310.4(b)(1)(iii).[786] During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's "do-not-call" provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) it must establish and implement written procedures to comply with the "do-not-call" provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and (4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's "do-not-call" provision.[787] In the NPRM, the Commission proposed three additional requirements which have to be met by sellers or telemarketers or others acting on behalf of a seller or charitable organization before they may avail themselves of the "safe harbor:" (1) they must use a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's national registry using a version of the registry obtained not more than 30 days before the calls are made; (2) they must maintain and record consumers' express verifiable authorizations to call; and (3) they must monitor and enforce compliance with their "do-not-call" procedures.

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[786] This provision has been renumbered in the amended Rule. In the original Rule and in the NPRM, the "safe harbor" provision is § 310.4(b)(2).

[787] 47 CFR 64.1200(e)(2).

Based on the record in this matter, and for the reasons set forth below, the amended Rule retains the "safe harbor" requirement to monitor and enforce compliance. However, the amended Rule deletes the "safe harbor" provision expressly requiring maintenance and recording of express verifiable authorizations.[788] In addition, § 310.4(b)(3)(iv), the "safe harbor" requirement to purchase and reconcile the registry, has been modified to delete the 30-day requirement and, instead, require that telemarketers employ a version of the registry which has been obtained no more than three months before a call is made, and to maintain records documenting that process.[789]

The Commission continues to believe that the Rule should contain a "safe harbor" from liability for violations of its "do-not-call" provision. Commenters generally agreed with this position.[790] Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their "do-not-call" rights should not be liable for violations that result from error. Further, as discussed in the NPRM, the Commission believes that the same rationale applies to potential violations of § 310.4(b)(1)(ii), and therefore has, in the introductory sentence of § 310.4(b)(5), extended the "safe harbor" to cover violations of *both* amended § § 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person's right to be placed on a "do-not-call" list, whereas § 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list.

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[788] This requirement was in § 310.4(b)(2)(v) of the proposed Rule.

[789] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[790] *See, e.g.*, ARDA-NPRM at 13; BofA-NPRM at 6; NACAA-NPRM at 9; Verizon-NPRM at 4-6. *But see* CATS-NPRM at 2; Patrick-NPRM at 5-6 (cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).

Although the Commission has extended the "safe harbor" provision to cover the additional practice of denying or interfering with a consumer's right to be on a "do-not-call" list, it has also tightened the provision by adding the requirement that sellers and telemarketers monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Section § 310.4(b)(5)(v) of the amended Rule requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(5)(i).

During the Rule Review, numerous commenters described the problems they had encountered in attempting to assert their "do-not-call" rights and with companies that continued to call after the consumer asked not to be called.[791] Several commenters echoed these complaints in their responses to the NPRM.[792] This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their "do-not-call" policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company's "do-not-call" policy be effective, only that such a policy exist.[793]

To clarify this apparent misconception about the Rule's requirements, the Commission proposed that, in order to avail themselves of the "safe harbor" provision, sellers and telemarketers must be able to demonstrate that, as part of ordi-

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[791] *See, e.g.*, Bennett-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 3; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR, *passim*; Nova53-RR at 1; Peters-RR at 1; Runnels-RR at 1.

[792] *See, e.g.*, Synergy Global-NPRM at 1-2 (ex-telemarketer says firm ignored "do-not-call" lists); Denny (Feb. 21, Msg. 970); Connolly (Mar. 6, Msg. 961); Young (Feb. 27, Msg. 165); Jackson (Feb. 2, Msg. 521); Horowitz (Feb. 27, Msg. 598); Truitt (Feb. 28, Msg. 687); Griffin (Feb. 28, Msg. 708); Loeher (Feb. 28, Msg. 729).

[793] Mey-RR at 2. *See also* DC-NPRM at 6-7.

nary business practice, they monitor and enforce compliance with the written procedures required by § 310.4(b)(5)(i). The Commission received few comments on this proposal, and those commenters supported the proposal.[794] Therefore, the Commission retains § 310.4(b)(5)(v) unchanged, except for renumbering. It is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures have been and are implemented in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(5) unless it can demonstrate that it actually trains employees in implementing its "do-not-call" policy, and enforces that policy.

Finally, in the "safe harbor" provision in the proposed Rule, the Commission required that the seller or telemarketer use a process to prevent calls to telephone numbers on the national "do-not-call" list, employing a version of the "do-not-call" registry obtained from the Commission not more than 30 days before the calls are made, and to maintain records documenting this process.[795] Virtually all comments on the safe harbor provision were directed at the proposed 30-day requirement for using the registry, which would have required sellers and telemarketers to reconcile or "scrub" the names on the registry with their customer list every 30 days. Industry commenters were unanimous in their view that a 30-day requirement would be extremely burdensome.[796] They

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[794] *See, e.g.*, DC-NPRM at 6-7; Verizon-NPRM at 5. *But see* Patrick-NPRM at 5-6 (cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).

[795] This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

[796] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8; Household Credit-NPRM at 13; Household Finance-NPRM at 13; HSBC-NPRM at 2; Nextel-NPRM at

also pointed out that a 30-day requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists, and would be particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.[797] Industry commenters urged the Commission to require quarterly updating, which is the standard adopted by the majority of states in implementing their "do-not-call" statutes.[798] They pointed out that, after an initial period of "volatility" when consumers sign up for the new registry, the number of names on the registry will stabilize and there may not be as great a need for frequent updating.[799]

The Commission is persuaded that the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision. Based on the record in this matter, the amended Rule modifies the "safe harbor" requirement that lists be reconciled every 30 days. Instead, re-numbered § 310.4(b)(3)(iv) of the amended Rule requires that the seller or telemarketer employ a version of the registry obtained not more than three months before any call is made, and maintain records documenting the process it uses to prevent telemarketing to any number on the list. Thus, telemarketers will be required to update their lists at

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26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[797] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[798] *See, e.g.*, ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8, 10; Household Credit-NPRM at 13, 15; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. *See also* June 2002 Tr. I at 234-72.

[799] *See* June 2002 Tr. I at 237-39.

least every three months, a time period that is consistent with most state requirements. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis, 24 hours a day, seven days a week, so telemarketers can access the registry at any time. As a result, each telemarketer's three-month period may begin on a different date. The Commission intends that the records documenting the process to prevent telemarketing calls to telephone numbers on the "do-not-call" registry will include copies of any express agreements the seller has obtained from consumers giving their permission for the seller to call, as well as documentation showing when and how often the seller has reconciled its list of names and/or telephone numbers against the national "do-not-call" registry.

The Commission is confident that the additional criteria in the amended Rule do not conflict with FCC regulations. FCC regulations are silent as to the process to be used, or the specific time frame within which the company must reconcile the names on its "do-not-call" list with its list of prospective customers to be called in a telemarketing campaign.[800] Therefore, any FTC requirement that there be a process in place to prevent calls to telephone numbers on a "do-not-call" list would not conflict with the FCC's regulations. Similarly, FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. Furthermore,

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[800] FCC regulations require companies to reconcile "do-not-call" requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR § 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's "do-not-call" request and place the consumer's name and telephone number on the company's "do-not-call" list at the time the request is made. The TSR is silent as to how frequently a company must reconcile "do-not-call" requests for company-specific lists.

as discussed more fully above, the Commission believes that it is necessary for the amended Rule to diverge from FCC regulations by imposing a monitoring requirement in the "safe harbor" provision in order to clarify the applicability of the safe harbor.

§ 310.4(c)—Calling time restrictions

Section 310.4(c) of the original Rule proscribes the making of outbound telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person's location.[801] In response to comments received during the Rule Review suggesting further limitations on calling times, the Commission noted in the NPRM that it declined to adopt further restrictions because the original Rule's calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry.

In response to the NPRM, the Commission received more than 100 comments from consumers on this issue, the vast majority of which recommended that the calling times be limited in some fashion. Many consumers urged that the calling times provision further restrict calls during the "dinner hour,"[802] or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children.[803] Some commenters urged the Commission to prohibit telemarketing on Saturdays, Sundays, or the entire weekend.[804] Still others urged the

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[801] *See* 16 CFR 310.4(c).

[802] *See, e.g.*, Harvey Butler (Msg. 197); Roy Broman (Msg. 452); Robert Clifton (Msg. 3762); Ernie and Helen Darrow (Msg. 9941); SSMBOYLE (Msg. 14401); Worsham-NPRM at 4.

[803] *See, e.g.*, John Hallberg Jones (Msg. 1644); Jim Coupal (Msg. 3504); Adam Block Willow (Msg. 3513); Donald Nelson (Msg. 4225); Lolla469 (Msg. 5115); Anonymous (Msg. 27184).

[804] *See, e.g.*, Sjkble (Msg. 12060) (no Saturday calls); OMEGA217 (no Sunday calls); David Meads (Msg. 13726) (no Sunday calls); Lisa

Commission to consider the plight of those shift workers for whom the current calling hours provide little or no protection from calls during "sleep time."[805]

The few industry comments regarding calling times were supportive of the current hours, but critical of the notion that allowing consumers to customize their preferred calling times via the national "do-not-call" registry would be workable.[806] EPIC noted that it favored retaining the current calling times provision, but found it desirable to allow consumers who wish to do so to set other preferred times via the national "do-not-call" registry.[807]

As noted in the NPRM, the Commission believes the current calling hours provide a reasonable window for telemarketers to reach their existing and potential customers. The Commission recognizes that while some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national

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Hallman (Msg. 20291) (no Sunday calls); H00Kie (Msg. 1040) (no weekend calls); Lee C. Clayton (Msg. 1950) (no weekend calls); Sherrell Goggin (Msg. 2247) (no weekend calls); Henry Miller (Msg. 10173) (no weekend calls); Nanagusgus (Msg. 12471) (no weekend calls).

[805] *See, e.g.*, Paul Merchant, Jr. (Msg. 387); Bobby Morris (Msg. 639); Gayle Tanner (Msg. 4505); Anonymous (Msg. 27196).

[806] *See* ARDA-NPRM at 13 (noting it felt no need to comment on this provision because the Commission had proposed no modification, and urging that no customizable calling preferences be allowed); NAA-NPRM at 17.

[807] *See* EPIC-NPRM at 18, 22 (noting that while generally acceptable, the current calling times "represent only the Commission's judgment on what time of day people most value their privacy," and urging the Commission to allow for customizable calling time preferences).

"do-not-call" registry, thus blocking most unwanted calls at all times.[808] Therefore, the Commission declines to modify the calling hours prescribed by § 310.4(c), and retains this provision without amendment.

§ 310.4(d)—Required oral disclosures

Section 310.4(d) of the original Rule requires that a telemarketer in an outbound call make certain oral disclosures promptly, and in a clear and conspicuous manner. The NPRM proposed to make two minor modifications to the wording of this section. First, the Commission proposed inserting, after the phrase "in an outbound telephone call," the phrase "to induce the purchase of goods or services." This would clarify that § 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made "to induce a charitable contribution"). Second, the Commission proposed to add the word "truthful" to clarify that it is not enough that the disclosures be made; the disclosures must also be made truthfully. The amended Rule adopts both modifications, but also provides additional guidance on when the oral disclosures should be made in upsell transactions and what information should be disclosed in those situations.

The Commission received very few comments on these proposed changes. NAAG expressed its support for inclusion of the word "truthfully" in this section, noting that however obvious it might seem that mandatory disclosures be made truthfully, abuses have occurred when, for example, a telemarketer misstates the purpose of the call, claiming it is a "courtesy" call rather than a sales call.[809] The Commission agrees that the express requirement that the required dis-

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[808] *See* amended Rule § 310.4(b)(1)(iii)(B), discussed above.

[809] *See* NAAG-NPRM at 47.

closures be "truthful" will benefit consumers, and should impose no additional burden on telemarketers. Thus, this requirement is adopted in the amended Rule.

A few commenters recommended limiting or expanding the provision. ASTA urged the Commission to limit the applicability of parts of the oral disclosure provision so that sellers with whom a customer had a prior business or personal relationship would be exempt from making two particular disclosures: 1) that the purpose of the call is to sell goods and services (§ 310.4(d)(2)); and 2) the nature of the goods and services (§ 310.4(d)(3)).[810] ASTA argued that it does not believe "situations in which there is a prior business or personal relationship between the parties, are, in practice, subject to the same sort of abuses that the Rule seeks to address by way of [the § 310.4(d)(2) and (3) disclosures]."[811] Tribune made a similar argument, requesting an exemption from compliance with the § 310.4(d) disclosures for newspapers with whom a customer has a prior business relationship. According to Tribune, in many instances, newspapers call current subscribers to ascertain whether the customer is satisfied, and then to offer additional services, such as the weekday paper in addition to an existing Sunday-only subscription; Tribune also believes the required oral disclosures may be off-putting to customers.[812] The Commission does not believe that the existence of a prior or even an ongoing business or personal relationship obviates the need for the required prompt oral disclosures in calls that are, in whole or in part, designed to induce the purchase of goods or services. Therefore, the Commission declines to create exemptions to § 310.4(d).

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[810] *See* ASTA-NPRM at 2.

[811] ASTA-NPRM at 2.

[812] *See* Tribune—NPRM at 9-10.

DOJ recommended that an additional disclosure—the "seller's title or position in the company"—be added to this section, arguing that such a disclosure would directly address the fraudulent practice wherein a telemarketing sales agent misrepresents that he or she holds a position of great authority within the company on behalf of whom the call is made, such as a claim that he or she is the president of the company.[813] Although the Commission agrees that such misrepresentations could be injurious to consumers, the Commission does not believe that in non-fraudulent solicitations a prompt, truthful disclosure of the telemarketing sales representative's position within the company would be so beneficial to consumers as to outweigh the costs to business of making such an additional disclosure. Further, the Commission believes that it is highly likely that fraudulent telemarketers who resort to such prevarication to induce sales will be in violation of other provisions of the Rule as well.[814] Therefore, the Commission declines to add a disclosure regarding the telemarketing sales agent's position within the company.

A few commenters requested further clarification regarding the meaning of the term "promptly," suggesting that it is too vague to be a useful guideline in the Rule.[815] One of these commenters also sought to clarify the timing of the prompt oral disclosures required by this section in a multiple purpose

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[813] DOJ-NPRM at 5 (also noting that some fraudulent telemarketers claim to be with government agencies. The Commission notes that such a misrepresentation would violate amended Rule § 310.3(a)(2)(vii)).

[814] For example, such a "false and misleading" statement, if made to "induce any person to pay for goods or services or to induce a charitable contribution," would violate amended Rule § 310.3(a)(4).

[815] LSAP-NPRM at 17 (urging that the term "promptly" be defined as "at the outset of the call"); NASUCA-NPRM at 16; Patrick-NPRM at 3 (suggesting that at least the identity of the seller be disclosed "*first*, before any other information is disclosed").

call.[816] These two issues were discussed at length in the NPRM, and the Commission reiterates here what it has previously stated: 1) the term "promptly," as used in the Rule, means "at once or without delay, and before any substantive information about a prize, product or service is conveyed to the customer," a standard which allows for some flexibility without sacrificing the consumer's need to know certain material information prior to the beginning of any sales pitch; and 2) in "any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the [§ 310.4(d) disclosures] must be made 'promptly,' during the first part of the call, before the non-sales portion of the call takes place."[817] The Commission does not believe that any change in the text of the Rule is necessary to achieve clarity regarding these two issues, nor does it believe the suggested modifications would provide greater clarity; thus, the Commission declines to modify this section.

A few commenters suggested that an additional disclosure—of the seller's telephone number—should be added.[818] NASUCA suggested that this number be one useful to consumers who wish to be placed on a seller's "do-not-call" list, while Patrick suggested that the number be one consumers could use to report violations of the Rule. Patrick suggested, in the alternative, that the Rule prohibit the failure to provide name, address, and telephone number information for the seller or telemarketer, if such information is requested by the consumer. The Commission previously has expressed its concern that if too many disclosures are required, particularly in the beginning of the call, their effectiveness is diluted. Further, the Commission believes that amended

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[816] *See* NASUCA-NPRM at 16.

[817] 67 FR at 4526 (citing the original SBP).

[818] NASUCA-NPRM at 15; Patrick-NPRM at 4.

§ 310.4(a)(7), regarding transmission of Caller ID, and § 310.4(b)(1)(iii)(B), creating a national "do-not-call" Registry, will help to mitigate the problem these commenters have proposed to cure. Therefore, the Commission declines to require a disclosure of the seller's telephone number in this section.

As explained in the discussion of § 310.2(dd) above, regarding the definition of "upselling," the Commission believes that upsell transactions are analogous to outbound telephone calls. Therefore, the amended Rule requires that the oral disclosures mandated by § 310.4(d) must be promptly disclosed at the initiation of the upsell if any of the information in these disclosures differs from the disclosures made in the initial transaction. For example, in an external upsell (where there is a second seller), the consumer must be told the identity of the second seller—the one on whose behalf the upsell offer is being made. In an internal upsell, however, the identity of the seller remains the same in both transactions and need not be repeated in the second transaction. Thus, the Commission has inserted the phrase "or internal or external upsell" after the term "outbound telephone call" in § 310.4(d) of the amended Rule; and has inserted the requirement that "in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent the information in the upsell differs from the disclosures provided in the initial telemarketing transaction." The goal in this provision is to ensure that consumers receive all of the information they need in order to make an informed decision whether to make a purchase,[819] without requiring duplicative or irrelevant disclosures.

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[819] As the Commission noted in the NPRM:

> "[I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on

§ 310.4(d)(4)—Sweepstakes disclosure

Section 310.4(d)(4) of the original Rule required that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the NPRM, the Commission proposed to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer's chances of winning a prize or sweepstakes, which would make the amended Rule's disclosure requirement consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act ("DMPEA").[820] As discussed above with regard to the same disclosure in § 310.3(a)(1)(iv), commenters generally supported this proposal.[821]

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behalf of two distinct sellers, it is crucial that consumers . . . clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller's identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services."

67 FR at 4500. The proposed Rule also required telemarketers on behalf of charitable organizations to adhere to the requirements for upsell transactions. However, the record in this proceeding does not show any evidence that upselling is prevalent in the solicitation of charitable contributions. Therefore, the Commission has deleted any reference to charitable solicitations from the upselling provisions. The Commission will continue to monitor this issue, and, if necessary, may address it in future rule reviews.

[820] *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

[821] NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4. *See also* June 2002 Tr. II at 105-15.

PMA maintained that the disclosure was unnecessary and that there was no evidence in the record to support adding the disclosure.[822] Nonetheless, PMA stated that, as a gesture of good faith, they would not oppose the change.[823] They asked, however, that the Commission allow them flexibility on when to make the disclosure, rather than mandating that it be made "promptly," as required by § 310.4(d), because the disclosure would be more meaningful if it were delivered in conjunction with the sales solicitation rather than the discussion about the sweepstakes.[824]

The Commission believes that it is important that consumers promptly be put on notice when a call promoting a sweepstakes also includes a sales solicitation. The Commission does not believe it necessary to script the telemarketing call or to define with finite specificity within how many seconds particular disclosures must be made. As with the Rule's requirement that the telemarketer promptly disclose that no purchase or payment is necessary to win a prize,[825] the Commission believes that the disclosure that a purchase will not enhance the consumer's chances of winning may occur "before or in immediate conjunction with the description of the prize."[826] As the Commission stated in the original Rule's SBP, this language was included in § 310.4(d)(4) "to prohibit deceptive telemarketers from separating the disclosure (in that instance, of the fact that no purchase or payment is

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[822] PMA-NPRM at 4-8.

[823] PMA-NPRM at 5, 7; ARDA-NPRM at 14-15. *See also* June 2002 Tr. II at 106, 108 (PMA and ARDA state that they do not oppose the disclosure).

[824] June 2002 Tr. II at 106-07. ARDA also requested flexibility in the timing of the disclosure. ARDA-NPRM at 14-15 and June 2002 Tr. II at 108.

[825] This provision is found at § 310.4(d)(4) of the original and amended Rules.

[826] 16 CFR 310.4(d)(4); 60 FR at 43856.

necessary to win a prize) from the description of the prize, thereby negating or diluting its salutary effect."[827] Although this guidance does not alter the imperative that the disclosures be made "promptly"—i.e., "at once or without delay," but "[a]t a minimum. . . before any sales pitch is given"[828]—it should provide telemarketers of prize promotions the necessary flexibility in making the requisite disclosures.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to fail to disclose truthfully, promptly, and in a clear and conspicuous manner, in any prize promotion, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the customer's chances of winning, and, upon request, the no-purchase/no-payment method of participating in the prize promotion.

§ 310.4(e)—Required oral disclosures in charitable solicitations

As noted in the NPRM, § 1011(b)(2)(D) of the USA PATRIOT Act mandates that the TSR include a requirement to address abusive practices in the solicitation of charitable contributions.[829] Specifically, the USA PATRIOT Act directs the Commission to include in the Rule:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and to make such other

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[827] 60 FR at 43856-57.

[828] TSR Compliance Guide at 15. *See also* 60 FR at 43856.

[829] *See* 67 FR at 4522 (discussing the USA PATRIOT Act's mandate to include in the TSR certain prompt disclosures in the solicitations of charitable contributions).

> disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.[830]

In response to this mandate, the Commission included in the proposed Rule new § 310.4(e), which requires in calls to solicit charitable contributions the truthful, prompt, clear and conspicuous disclosure of two pieces of information: 1) the identity of the charitable organization on behalf of which the request is being made; and 2) that the purpose of the call is to solicit a charitable contribution.[831] The Commission declined to require the oral disclosure of a charitable organization's mailing address because it was dubious that requiring disclosure of this information in every instance would prove sufficiently beneficial to consumers to justify the costs incurred by telemarketers, and the charities for whom they solicit, of making this disclosure.[832] However, the Commission did pose specific questions on this issue, including whether the disclosure requirement should be triggered only when a donor asks for such information.[833]

Few comments addressed the proposed requirements for disclosures in the solicitation of charitable contributions.[834] AFP agreed that the proposed Rule struck the appropriate balance, by requiring disclosure of both the identity of the charity and the fact that the purpose of the call was to solicit a

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[830] Section 1011(b)(2)(D), Pub. L. 107-56 (Oct. 26, 2001).

[831] Proposed Rule § 310.4(e); *see also* 67 FR at 4522 (including the discussion of the rationale for including these specific disclosures).

[832] 67 FR at 4522.

[833] 67 FR at 4522, 4539.

[834] As noted above in the section discussing amended § 310.3(d), AARP and NCL noted in their comments in response to the NPRM that they supported the goal of expanding the Rule's ambit to cover charitable solicitations.

charitable contribution, but not requiring disclosure of the mailing address of the charity.[835] AFP also noted that the required disclosures are consistent with its own ethics standards and its belief that these disclosures are sufficient to effectuate the purposes of the USA PATRIOT Act.[836] AFP recommended against including a required disclosure of the charitable organization's mailing address, arguing that such information would be of little use to consumers in discerning whether a charity was legitimate, and that the time and distraction involved in disclosing an address would be "counterproductive to the charitable contribution process."[837]

Hudson Bay expressed its view that both of the proposed disclosures are unconstitutional.[838] According to Hudson Bay, the requirement that a telefunder promptly disclose that the call is to solicit a charitable contribution runs afoul of the First Amendment because it mandates not only what must be said, but when.[839] Hudson Bay further argues that the mandatory disclosure of the name of the charitable organization on behalf of which the solicitation is made strips charitable organizations of their right to anonymity and violates the First Amendment's guarantee of freedom of association.[840]

As previously noted, the USA PATRIOT Act directs the Commission to include these specific disclosures in the TSR.[841] Congress' purpose in the Telemarketing Act, in

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[835] *See* AFP-NPRM at 3.

[836] *Id.*

[837] *Id.* (noting, however, that it had no objection to requiring the disclosure of the mailing address, provided the donor asked for such information).

[838] *See* Hudson Bay-Goodman-NPRM at 6-7.

[839] *Id.* (*citing Riley*, 441 [sic] U.S. at 791).

[840] *Id.* at 7 (*citing Talley v. California*, 362 U.S. 60 (1960)).

[841] USA PATRIOT Act, § 1011.

requiring telemarketers to disclose basic identifying information in unsolicited outbound telemarketing calls, is to ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. The Commission believes that the USA PATRIOT Act amendments are consistent with this purpose. Moreover, the Commission believes there is a tight nexus between this purpose and the statutory and regulatory means employed to achieve this purpose. The Commission also believes that these disclosure requirements are very narrowly tailored to impinge as little as possible on protected speech while still accomplishing the purpose Congress intended. The Commission has exercised restraint in implementing this statutory mandate, keeping the disclosure requirements for charitable solicitation telemarketing to the bare minimum necessary to fulfill the purpose of the USA PATRIOT Act amendments. The Commission notes that the Supreme Court has specifically noted that requiring a professional fundraiser "to disclose unambiguously his or her professional status . . . [is a] narrowly tailored requirement [that] would withstand First Amendment scrutiny."[842] The Commission believes that if a requirement to disclose one's status as a professional fundraiser would pass First Amendment scrutiny, then so would a requirement to make the disclosures now required by the Rule to fulfill the mandate of the USA PATRIOT Act amendments.

Some commenters recommended that the Commission expand the provision to require additional disclosures in certain circumstances. For example, NAAG recommended that, in the event a paid telefunder is making the charitable solicitation, three additional disclosures be required: "(1) the name of the caller; (2) the name of the telemarketing

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[842] *Riley*, 487 U.S. at 799, n.11.

company; and (3) the fact that the caller is being paid to solicit."[843] NCL concurred, suggesting that the Rule require fundraisers to "identify themselves as well as the charities on whose behalf they are operating."[844] NAAG and NCL argued that this additional set of disclosures would provide three distinct benefits. First, such disclosures would prevent donors from being deceived about the identity of the solicitor. NAAG noted that in many instances, for-profit fundraisers "misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling."[845] Second, the information would serve as an important means of identifying potential Rule violators.[846] The third benefit from these suggested disclosure requirements would be the triggering role they would serve, prompting consumers to inquire, of the telefunder or of a state regulatory agency, about the amount of their contribution that will go to charity after the fundraiser takes its share.[847]

The Commission declines to add a mandatory disclosure of the name of the caller in calls to induce charitable contributions. In the initial proposed TSR, the Commission had included such a requirement for all outbound telephone calls;[848] but it was deleted because commenters noted that "'desk names' are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice and harassment."[849] The Commission

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[843] NAAG-NPRM at 52.

[844] NCL-NPRM at 11. *See also* Make-A-Wish-NPRM at 6 (recommending adding a disclosure that the professional fundraiser is being paid for its services); NASCO-NPRM at 6.

[845] NAAG-NPRM at 52.

[846] NCL-NPRM at 11.

[847] NAAG-NPRM at 52; *see also* NCL at 11.

[848] *See* 60 FR at 8331 (§ 310.4(d)(1)(i)).

[849] 60 FR at 30418.

concluded that the disclosure of the seller's identity is most meaningful to consumers, not the name of the individual with whom they are speaking. The Commission can conceive of no reason why this analysis would not apply with equal force in the context of charitable solicitations. Moreover, the Commission is not persuaded that disclosure of this information is necessary to advance the privacy objectives underlying the Commission's authority to prohibit "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.[850] Therefore, the Commission declines to include in the amended Rule a requirement that the caller's name be disclosed in charitable telemarketing solicitations.

The Commission also declines to adopt the suggestion that it mandate disclosure of the name of the telemarketing company.[851] In adopting the original Rule, the Commission rejected such a disclosure in the context of the sale of goods or services because it was deemed unnecessary; rather, a requirement to disclose the identity of the seller—which is clearly material to the consumer—was included. In the charitable fundraising context, the Commission believes the identity of the charity is the analogous material item of information. The Commission believes there is a limit to the number of distinct items of information that can reasonably be absorbed at the beginning of a solicitation call. This being the case, the Commission believes that the charity's identity is a more meaningful piece of information than the name of

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[850] *See* discussion of § 310.4 above, describing the Commission's analysis of its authority to prohibit "abusive" practices.

[851] The Commission notes, however, as discussed by NAAG, that at least 20 states have statutes requiring such a disclosure. NAAG-NPRM at 52. The Commission believes that the states, which have extensive regulatory authority over charities, and extensive experience in such regulation, may continue to require disclosures beyond those mandated by the TSR, and notes that compliance with the TSR will not fulfill telemarketers obligations under any such state laws or regulations.

the professional fundraising company. In this regard, it is noteworthy that the USA PATRIOT Act did not specifically require such a disclosure.[852] Arguably, disclosure of the identity of the telemarketer may be beneficial to potential donors because it may prompt them to think and inquire about the portion of a contribution that will be consumed by a professional fundraiser's fee; but the Commission believes the record falls short of showing that the benefits of mandating such a disclosure would outweigh the burdens it would impose upon legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[853] Therefore, the Commission does not believe the current record supports a finding that disclosure of this information is necessary to prevent "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.[854]

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[852] *See* USA PATRIOT Act § 1011(b)(2)(D). The absence of such a requirement from the USA PATRIOT Act is noteworthy because such a disclosure was specifically approved in Riley. 487 U.S. at 799, n.11.

[853] As noted by Not-for-Profit Coalition, Hudson Bay and others, telefunders play a critical role in enabling charitable organizations, particularly smaller ones, to raise funds necessary to fund their missions. Not-for-Profit Coalition-NPRM at 17-20; Hudson Bay-Goodman-NPRM at 2.

[854] The Commission believes that, as in the case of the required oral disclosures in the sale of goods or services, the failure to make certain material disclosures in the solicitation of a charitable contribution rises to the level of an abusive practice under the Rule. As noted in the NPRM, the Commission believes that the prompt disclosure of certain information in a telemarketing call to induce the sale of goods or services is necessary to enable a consumer "to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion." 67 FR at 4511. Similarly, a consumer who receives a telemarketing solicitation to induce a charitable contribution must have certain information to determine if he or she wishes to continue the call. At this time, the Commission believes it prudent to require only the disclosure of the name of the charity on whose behalf the fundraising is occurring and that the call is being made to induce a charitable contribution. However, the Commission will continue to study the issue and will revisit it during the next Rule Review.

For similar reasons, the Commission also declines to require a mandatory disclosure that the telemarketer is a paid fundraiser. The comments on this issue reflect considerable concern about instances where only a minuscule portion of contributions are devoted to the actual support of a charitable organization's mission, while the telefunder's fee gobbles up the lion's share. This occurs in some instances,[855] but the record does not support an inference that such a scenario inevitably follows from the use of paid telefunders by charitable organizations, and there is evidence on the record tending to show that the opposite is often true: the use of professional telemarketers saves charitable organizations money—as compared with in-house telephone fundraising.[856]

Additionally, the Commission is concerned here, as it is with the other recommended disclosures, about the potential negative consequences that derive from overloading the beginning of a charitable solicitation call. Further, it is notable that the USA PATRIOT Act did not specifically require such a disclosure.[857] While disclosure of the identity of the telemarketer may, arguably, be beneficial to potential

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[855] *See, e.g.*, Pennies for Charity, 2001, New York Attorney General, http://www.oag.state.ny.us/charities/pennies01/penintro.html (accessed Oct. 8, 2002) (stating that "charities retained an average of 31.5% of the funds raised by telemarketers registered to solicit contributions in New York in 2000. Some of the charities received much less than that and some received nothing at all."); NASCO-NPRM at 2 (citing the New York Attorney General's report as well as a 1999 report by the California Attorney General showing charities received only 48.2 percent of funds raised by telemarketers who solicited on their behalf in California that year). *See also* Private Citizen-NPRM at 5.

[856] Hudson Bay-Goodman-NPRM at 2.

[857] *See* USA PATRIOT Act § 1011(b)(2)(D). This omission, too, is conspicuous in light of the fact that numerous states have included this mandatory disclosure and that such a disclosure is, at least in dicta, sanctioned by the Court in *Riley*. *See* NAAG-NPRM at 52; *Riley*, 487 U.S. at 799, n.11.

donors because it may prompt them to think and inquire about the proportion of a contribution that will be consumed by a professional fundraiser's fee, the Commission believes the record does not support mandating such a disclosure because of the burden the disclosure would impose on legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.[858] A showing of these benefits would be necessary to support a requirement for disclosure of this information. Therefore, the Commission declines at this time to add a requirement that the telemarketer disclose that he or she is being paid to solicit charitable contributions.

Other issues regarding abusive practices raised in response to the NPRM.

Commenters responded to the Commission's questions in the NPRM regarding additional issues related to abusive practices that had surfaced during the Rule Review, in particular, prison-based telemarketing. Commenters also raised other issues: telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. Each of these issues, and the reasoning behind the Commission's responses to them, are discussed in detail below.

Prisoner telemarketing: During the Rule Review, the Commission received several comments describing problems that had occurred when sellers or telemarketers used prison inmates to telemarket goods or services. These commenters recommended that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate it, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the

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[858] *See* note 856 above.

public.[859] These commenters cited several graphic incidents in which inmates have abused consumers' information and other resources to which they had access through inmate telemarketing to make improper, invasive, and illegal contact with members of the public.[860]

Specifically, these commenters pointed out that, while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.[861] In the NPRM, the Commission stated that it was extremely concerned about the potential misuse of personal information and abusive telemarketing activity in connection with prison-based telemarketing, but also that some public benefit likely came from inmate work programs that entail telemarketing.

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[859] *See generally* Jordan-RR, S. Gardner-RR, Budro-RR, and Warren-RR. In addition, this issue received considerable attention during the Rule Review Forum. *See* RR Tr. at 220-45, 367-75, 443-47.

[860] For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. *See* FTC, "Individual Reference Services: A Report to Congress" (Dec. 1997), at 16. Several states, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about individuals who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. *See Prison to End Telemarketing By Inmates*, SALT LAKE TRIB., June 1, 2000, at B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. *See* RR Tr. at 371-72.

[861] *See generally* Jordan-RR, Gardner-RR, Warren-RR, and Budro-RR.

The Commission noted that the record contained insufficient information upon which to base a proposal regarding prisoner telemarketing or to assess the costs and benefits of such a proposal. Therefore, the NPRM posed several questions to elicit comment on what action by the Commission, if any, might be appropriate regarding this issue.

In response to the NPRM, the Commission received several comments on this issue.[862] In addition, the June 2002 Forum devoted a session to the topic.[863] Based on the entire record in this proceeding, the Commission has determined that any problems associated with the use of prison-based telemarketing would be more appropriately handled by the state legislatures and regulatory agencies than by adding a provision to the TSR.

The comments show that the number of inmates used for commercial telemarketing purposes is a small percentage of the prisoners who are employed in inmate work programs.[864] The majority of prison-based telemarketing programs are used by federal and state governments, often for

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[862] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. In addition, *see generally* CURE-NPRM; CCA-NPRM; UNICOR-NPRM; EPI-NPRM; and EPI-Supp.

[863] June 2002 Tr. III at 115-57.

[864] The comments indicate that federal inmates are not used as telemarketers except in connection with sales to the federal government. (UNICOR is the trade name for Federal Prison Industries, Inc., a wholly-owned government corporation within the U.S. Department of Justice, Federal Bureau of Prisons. UNICOR sells its products primarily to federal agencies and uses federal prisoners in connection with those sales. In addition to calling UNICOR's federal government agencies, the federal prisoners also call the businesses that support UNICOR's federal sales.) UNICOR-NPRM at 2; *see also* EPI-Supp. at 1. UNICOR's sales using prisoner-based telemarketing would not be covered by the TSR. Section 310.6(g) of the Rule exempts telemarketing sales to businesses. In addition, sales to government entities do not fall within the Rule's definition of "person."

such tasks as providing information to consumers who call state tourist bureaus.[865] A 1999 GAO Report reveals that only seven percent of the inmates who had access to consumer information were performing work for private firms, while 93 percent were working for government agencies, performing tasks such as answering calls from the public to state tourist centers.[866] Thus, the vast majority of prison-based telemarketing would be outside the ambit of the Rule because it does not involve "telemarketing" as that term is defined in the Rule.[867]

EPI estimates that there are only ten private companies in the United States who use prisoners as telemarketers, that these ten companies employ approximately 300 inmates in prison-based telemarketing programs, and that all these programs use inmates housed in state prisons.[868] Commenters noted that the state prison work programs are heavily regulated by the state legislatures and Departments of Correction.[869] EPI points out that the federally-administered Prison Industry Enhancement ("PIE") program was created to encourage the states and local governments to establish inmate work programs that mimic the private work

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[865] EPI-Supp. at 1.

[866] "Prison Work Programs, Inmates" Access to Personal Information," GAO/GGD-99-146, cited in EPI-NPRM at 13, n.18. *See also* EPI-Supp. at 1 (All prisoners employed as telemarketers by the private sector are inmates in state prisons, regulated by state agencies.).

[867] "Telemarketing" is defined, in part, as a "plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution . . ." The prison-based telemarketing used by government agencies does not appear to involve calls to "induce the purchase of goods or services."

[868] EPI-NPRM at 2, 3, 9.

[869] CCA-NPRM at 2; EPI-NPRM at 3, 14.

environment. In passing the legislation, Congress elected to have the states manage these programs.[870]

Opponents of the use of prison-based telemarketing cited the potential for misuse of consumers' personal information by inmates, but were unable to point to actual incidents other than the isolated example raised during the Rule Review.[871] EPI noted that, after an exhaustive search, the 1999 GAO study was able to identify only nine incidents of misuse over an eight-year period, and only three of those nine incidents were the result of telemarketing for a private firm.[872] Commenters noted that similar problems occur, perhaps with even more frequency, among non-prisoner or civilian telemarketers.[873]

The proponents of prison-based telemarketing pointed out the significant social and economic benefits that accrue to the inmates, to the states, and to society as a whole by having inmates engage in productive work that develops skills that can later be transferred to a private sector job once the inmate is released.[874] They indicate that inmate jobs serve as a source of funds to compensate crime victims, provide financial support to children of inmates, repay taxpayers for the inmates' room and board, and are an effective tool for rehabilitation and reducing recidivism.[875] They maintain that inmate jobs are "vital to helping keep prisons safe and secure and offering meaningful educational and vocational training

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[870] EPI-NPRM at 3.

[871] DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. *See also* June 2002 Tr. III at 115-57.

[872] EPI-NPRM at 10.

[873] CURE-NPRM at 1; EPI-NPRM at 13-14. *See also* June 2002 Tr. III 115-57.

[874] *See generally* CURE-NPRM; CCA-NPRM; EPI-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[875] *Id.*

to aid in successful re-entry."[876] These commenters outlined the significant precautions taken in screening and monitoring inmates for these jobs.[877]

Based on the record in this proceeding, the Commission believes that, while there is some evidence of consumer injury in a very few documented cases, it is not possible to conclude that the risk of consumer harm outweighs the countervailing benefits. Such a conclusion would be necessary to condemn prison-based telemarketing as an abusive practice.[878] The extensive system of state regulation, coupled with the local nature of the work programs, persuades the Commission that any problems associated with prison-based telemarketing would best be handled at the state level.

Use of couriers: In response to the NPRM, AARP again raised its concern that the Commission ban the practice of allowing couriers, including overnight mail delivery services, to pick up payment for goods and services purchased through telemarketing.[879] AARP points out that the use of couriers in sweepstakes and lottery scams is prevalent, and that some unscrupulous telemarketers use couriers not only to quickly separate the consumer from his or her money, but to make a "contest seem more 'official.'"[880] AARP notes that, in some instances, even legitimate companies benefit unfairly from the use of couriers by avoiding oversight by the U.S. Postal Service, and by ensuring that non-refundable "deposits" are secured, diminishing the likelihood, in many instances, that a

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[876] CCA-NPRM at 1. *See also* EPI-NPRM at 5-8; and generally CURE-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

[877] EPI-NPRM at 5-8. *See also* June 2002 Tr. III at 115-57.

[878] *See* 67 FR at 4510-12.

[879] AARP-NPRM at 9-10.

[880] *Id.* (citing NAAG's comment in the original rulemaking proceeding).

consumer would back out of a transaction.[881] NACAA concurred, and noted its further concern that in-person payment pickups by those posing as public safety officers is a practice perhaps even more harmful to consumers who are intimidated into quickly giving a contribution.[882]

The record does not contain any new evidence regarding the potential harm that accrues from the use of couriers, or any new evidence regarding the benefits to legitimate companies of being able to use couriers to collect payment. Although the Commission recognizes that fraudulent telemarketers often use couriers to collect payment, it continues to believe that "[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business."[883] Moreover, the Commission reiterates its view that telemarketers who seek to use courier services to defraud consumers are likely to "engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule."[884] Therefore, the Commission declines to adopt the recommendation to ban the use of couriers to collect payment for goods or services sold through telemarketing.

Targeting vulnerable groups and the sale of victim lists: DOJ proposed that the Commission include in the amended Rule a provision that "would prohibit a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source."[885] This suggested change responds to the problems of the sale of victim lists and the targeting of vulnerable groups. As DOJ explains, such

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[881] AARP-NPRM at 9-10.

[882] *See* NACAA-NPRM at 10-11.

[883] 60 FR at 30415.

[884] *Id.*

[885] DOJ-NPRM at 7.

a provision would "ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of 'mooch lists' by any individual or corporate defendants in the action," and lay the foundation for criminal contempt proceedings if such an injunction were violated.[886] DOJ also argued that such an injunction, served on "any list provider known to have done business with the fraudulent telemarketer," would limit such telemarketer's ability to resume fraudulent solicitations.[887] Finally, DOJ noted that such a provision "would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes "vulnerability" or "targeting."[888]

After careful consideration, the Commission has determined not to adopt the provision proposed by DOJ. The Commission believes that it is unnecessary to include an explicit prohibition against Rule violators purchasing lists of prospective contacts to provide the benefits detailed by DOJ in its comment. In numerous cases, the Commission has already included a similar prohibition in final orders that achieves the goals articulated by DOJ.[889] Thus, the

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[886] *Id.*

[887] *Id.*

[888] *Id.*

[889] *See, e.g., FTC v. Fed. Data Servs.*, No. 00-6462-CV-Ferguson (S.D. Fla. filed Apr. 3, 2000) (Stipulated final judgment entered Jan. 9, 2001); *FTC v. Data Med. Capital*, Inc., No. SA-CV-99-1266AHS (EHC) (S.D. Cal. filed Oct. 14, 1999) (Stipulated final order for permanent injunction and other settlement of claims entered July 13, 2001); *FTC v. RJB Telecom, Inc.*, No. CIV002017PHXEHC (D. Ariz. filed Oct. 25, 2000) (Stipulated final judgment and order for permanent injunction filed Aug. 27, 2001); *FTC v. Story d/b/a Network Publ'ns.*, No. 3-99CV0968-L (N.D. Tex. filed Apr. 25, 1999) (Stipulated order for permanent injunction and civil penalty filed June 6, 2000).

Commission declines to include a provision to this effect in the amended Rule.

E. Section 310.5—Recordkeeping

Section 310.5 of the original Rule identifies the kinds of records that must be kept by sellers and telemarketers, and the time period for retention of these records.[890] In the NPRM, the Commission noted that it had declined to adopt any of the suggested modifications to this section submitted pursuant to the Rule Review. Specifically, the Commission declined to: (1) reduce the record retention period to less than 24 months; or (2) tie the duration of record retention either to the value of the goods or services sold or the refund policy of the seller, believing that such modifications would minimize the effectiveness of this provision in law enforcement.[891] The Commission did note that the effect of the USA PATRIOT Act amendments was to extend the recordkeeping requirement to include not only calls to induce the purchase of goods or services, but also calls to induce charitable contributions.[892] The only explicit change to the language of the section to implement the USA PATRIOT Act amendments was to add the phrase "or solicitations of charitable contributions" to § 310.5(a)(4) following the phrase "employees directly involved in telephone sales."[893]

Very few comments addressed the recordkeeping requirements set forth in § 310.5. ARDA noted that it "agrees with the Commission and feels that the current provisions are

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[890] 16 CFR 310.5.

[891] 67 FR at 4527-28.

[892] 67 FR at 4528.

[893] Due to an oversight, the text of the NPRM noted the correct language of the provision ("or solicitations of charitable contributions"), while the text of the proposed Rule included an abbreviated version ("or solicitations").

adequate."[894] DMA-NonProfit stated that "imposing burdensome and lengthy (two-year) recordkeeping responsibilities" on charities would hurt the ability of charities, especially small ones, because it would divert funds away from fulfillment of charities' missions.[895] The Commission believes that the recordkeeping burden on telemarketers who solicit on behalf of charities will be minimal. As noted in the SBP for the original Rule, the recordkeeping provision was already tailored to "strike a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions. . ."[896] In addition, the Commission believes that the records required to be maintained are those commonly maintained by businesses in the ordinary course of business.[897] The Commission believes that, as applied to telemarketers who solicit on behalf of charities, the burden of compliance with the recordkeeping provision will be further lessened because many of the recordkeeping provisions will be inapplicable in the charitable solicitation context, or are burdens typically borne by the telemarketer, not the organization on whose behalf the calls are made.[898]

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[894] ARDA-NPRM at 17. ARDA did reiterate, however, its concern that "overlapping, inconsistent, and conflicting state laws create a substantial burden."

[895] DMA-NonProfit-NPRM at 16.

[896] 60 FR at 43857.

[897] *Id.*

[898] For example, § 310.5(a)(2) only applies when the offer includes a prize promotion, a circumstance unlikely to be implicated in most charitable solicitations. Section 310.5(a)(3) only applies in the commercial solicitation context, as it requires maintenance of records showing information about "customers." Section 310.5(a)(4) is a requirement typically borne by telemarketers, and the Commission believes that charitable organizations are unlikely to incur additional costs of compliance with this provision as a result of the Rule's inclusion of charitable solicitations. The Commission does not believe that compliance with amended

NEMA requested that the Commission consider the record-keeping burden on energy marketers who must, pursuant to their self-regulatory guidelines, already maintain certain records.[899] As noted above in the discussion of the express verifiable authorization provision, § 310.3(a)(3)(ii), the Commission believes that sellers, when they accept payment via methods that are novel or lack certain fundamental consumer protections, must obtain express verifiable authorization by any of the three means allowed by the amended Rule. The maintenance of such records is also necessary to ensure the law enforcement goals of the recordkeeping provision.

Finally, ERA noted in its supplemental comment that it believed that it would be expensive for telemarketers conducting upsells to comply with the Rule's recordkeeping requirements.[900] As addressed above in the discussion of § 310.4(a)(6), the Commission believes that both because the cost of digital audio recording and storage is decreasing, and because of the limited circumstances in which such recording is required under the Rule, the burden on sellers who choose to market goods and services using a combination of a "free-to-pay conversion" coupled with preacquired account information is offset by the consumer protection benefits that

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§ 310.5(a)(5), which requires that all verifiable authorizations or records of express informed consent or express agreement required to be provided under the Rule be maintained will be unduly burdensome to charities who are less likely to avail themselves of the marketing methods that implicate these Rule requirements. Therefore, the only provision of the record-keeping section that is likely to affect charities is § 310.5(a)(1), the requirement that "[a]ll substantially different advertising, brochures, telemarketing scripts, and promotional materials" be maintained. To the extent that retention of such materials is not already customary in the non-profit sector, the Commission believes that the burden of compliance is offset by the corresponding law enforcement benefits that accrue from this provision.

[899] NEMA-NPRM at 8-10.

[900] ERA-Supp. at 7.

will accrue from recording and maintaining consumers' express informed consent in these circumstances.

Thus, the only modification to the language of § 310.5 (a)(5) in the amended Rule is to require that in addition to retaining all verifiable authorizations, a seller or telemarketer must keep all "records of express informed consent or express agreement" for 24 months. This modification is necessitated by the introduction of these two terms in § 310.4(a)(6), dealing with unauthorized billing, and § 310.4(b)(1)(iii)(B)(i), addressing permission to a seller to call despite a consumer's inclusion on the national "do-not-call" registry. The Commission believes it is necessary for a seller or telemarketer to retain such records of express informed consent and express agreement to enable the Commission and the states to determine compliance with these provisions of the Rule.

F. Section 310.6—Exemptions

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.[901] The exemptions to the Rule were designed to ensure that legitimate businesses are not unduly burdened by the Rule.[902] Based on the record in this proceeding, and on its law enforcement experience, the Commission has determined to add an exemption, § 310.6(a), to

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[901] Specifically, the original Rule exempts: (1) goods and services subject to the Commission's Pay-Per-Call Rule and Franchise Rule; (2) telemarketing sales consummated after face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4) telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, "recovery," or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, "recovery," or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of nondurable office or cleaning supplies).

[902] 60 FR at 43859.

specifically exempt outbound calls to solicit charitable contributions from the national "do-not-call" registry provisions of the amended Rule. In addition, the Commission has determined to modify each of the subsections of the original Rule that are now found in renumbered § 310.6(b).

The Commission amends newly renumbered §§ 310.6 (b)(1), (2), and (3)[903] to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction, to comply with the "do-not-call" and certain other provisions of § 310.4.

The Commission amends renumbered § 310.6(b)(4),[904] which exempts inbound calls that are not a result of a solicitation, to make this exemption unavailable to upsell transactions and to calls in response to a message left pursuant to the abandoned call safe harbor provision in § 310.4(b)(4)(iii).

The Commission amends the general media exemption, now renumbered § 310.6(b)(5),[905] and the direct mail exemption, now renumbered § 310.6(b)(6),[906] to make these exemptions unavailable to upsells, and to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule. In addition, the amended Rule makes clear that email and facsimile messages are direct mail for purposes of the Rule. Finally, the amended Rule modifies the proposed business-to-business exemption, now at § 310.6(b)(7)[907] to clarify that

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[903] These exemptions were found at § § 310.6(a), (b), and (c) of the original Rule.

[904] This provision was § 310.6(d) in the original Rule.

[905] The general media exemption was at § 310.6(e) in the original Rule.

[906] The direct mail exemption was at § 310.6(f) in the original Rule.

[907] The business-to-business exemption was at § 310.6(g) in the original Rule.

sellers and telemarketers of nondurable office or cleaning supplies need not comply with the amended Rule's "do-not-call" provisions.

In addition, the amended Rule removes the proposal that would have made the business-to-business exemption unavailable to the telemarketing of Web services, Internet services, and charitable solicitations to businesses. Pursuant to the USA PATRIOT Act amendments to the Telemarketing Act, the Commission amends the Rule to expand several of the exemptions to encompass calls to induce charitable solicitations. Thus, the amended Rule exempts: charitable solicitation calls that are followed by face-to-face payment, § 310.6(b)(3); prospective donors' inbound calls not prompted by a solicitation, § 310.6(b)(4); charitable solicitation calls placed in response to general media advertising, § 310.6(b)(5); and donors' inbound calls placed in response to direct mail solicitations that comply with § 310.4(e). In the NPRM, the Commission proposed to make the business-to-business exemption unavailable for charitable solicitation calls. Based upon the record in this proceeding, the Commission has determined that it should not proceed with this proposal.

§§ 310.6(b)(1), (2), and (3)—Exemptions for pay-per-call services, franchising, and face-to-face transactions

Section 310.6(a) of the original Rule exempts all transactions subject to the Commission's Pay-Per-Call Rule.[908] Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.[909] Section 310.6(c) exempts transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not

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[908] The renumbered exemption in the amended Rule is found at § 310.6(b)(1).

[909] The renumbered exemption in the amended Rule is found at § 310.6(b)(2).

required, until after a face-to-face sales presentation by the seller.[910] In the NPRM, the Commission proposed to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions,[911] and require telemarketers selling these exempted goods and services to comply with § 310.4(a)(1) (prohibiting threats, intimidation, or use of profane or obscene language), § 310.4(a)(7) (requiring transmission of Caller ID), § 310.4(b) (prohibiting abusive pattern of calls and requiring compliance with "do-not-call" provisions), and § 310.4(c) (calling time restrictions).

The NPRM pointed out that the Rule Review record contained ample evidence of consumers' increasing frustration with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.[912] A number of participants in the Rule Review Forum concurred that the "do-not-call" provision of the Rule should also be applicable to calls where a seller attempts to set up an in-

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[910] Face-to-face transactions are also covered by the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429. This exemption has been renumbered in the amended Rule and is now found at § 310.6(b)(3).

[911] No modifications to § § 310.6(b)(1) and (2) are necessary to implement the USA PATRIOT Act amendments because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, it is necessary to amend [§ 310.6(b)(3) to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

[912] 67 FR at 4516-18. One consumer who spoke during the public participation portion of the DNC Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment. *See generally* DNC Tr. at 241-46 (Mey). *See also FTC v. Access Resource Servs.*, No. 02-60226 CIV GOLD (S.D. Fla. filed Feb. 13, 2002) (regarding Miss Cleo's psychic services where psychics continued to call consumers despite repeated requests from the consumer to stop calling).

person sales meeting at a later date.[913] For these reasons, the Commission proposed making face-to-face, franchise, and pay-per-call transactions subject to the "do-not-call," calling time restriction, and certain other abusive practices provisions in § 310.4.

Consumer and privacy advocates, as well as state regulators, supported the Commission's proposal to make these transactions subject to the "do-not-call" and certain other provisions of § 310.4.[914] They recommended that, in order to be effective, a "do-not-call" registry should have as few exemptions as possible. PRC pointed out:

> [T]elemarketing as a business practice transcends the boundaries of regulated and unregulated industries. So-called "cold calling" is a common marketing technique, used by the most established regulated entity down to the fraudulent "boiler room" that is here today and gone tomorrow.
>
> Each type of entity—and all those in between that make unwanted telephone calls to a private home—contribute to privacy invasions, costs for devices to stop the invasions, and the overall annoyance factor voiced so strongly by the public. For this reason, telemarketing abuses can only be curtailed if the practice itself—rather than the type of business involved—is subject to the Commission's rules.[915]

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[913] *See* RR Tr. at 291-96.

[914] EPIC-NPRM at 20; PRC-NPRM at 3-4 (there should be no exemptions whatsoever from "do-not-call" registry); FCA-NPRM at 1-2 (intrastate calls should not be exempt); NAAG-NPRM at 57; NFDA-NPRM at 5 (in connection with the face-to-face transaction exemption, telemarketers should also be required to comply with the oral disclosure requirements of § 310.4(d)).

[915] PRC-NPRM at 3-4.

The Commission received no comments opposing application of the "do-not-call" and other abusive practices provisions to pay-per-call transactions. With regard to transactions subject to the Commission's Franchise Rule, industry commenters expressed concern about ambiguities on how the "do-not-call" and calling time restrictions would be applied when inbound calls are converted to outbound calls.[916] The Commission has addressed this issue in its discussions above of the definition of "outbound call" and required disclosures in upsell transactions. IFA also noted that compliance with a national "do-not-call" registry would be costly, particularly if the registry does not contain an exemption for established business relationships and does not preempt state "do-not-call" laws.[917] The Commission has addressed these issues in its discussion above regarding the national "do-not-call" registry.

Face-to-face transactions: Industry commenters generally opposed making face-to-face transactions subject to the "do-not-call," calling time restriction, and certain other abusive practices provisions.[918] These commenters argued that face-to-face transactions should continue to be exempt because their practices are already heavily regulated by the states and by the Commission through other FTC rules and thus are less susceptible to abusive practices.[919] However, the national

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[916] Car Wash Guys-NPRM at 51-56; IFA-NPRM at 2; NFC-NPRM at 3.

[917] IFA-NPRM at 2.

[918] *See generally* Craftmatic-NPRM; DSA-NPRM; NAR-NPRM; ICFA-NPRM at 2-3; Insight-NPRM. *See also* June 2002 Tr. III at 157-226. *But see* ARDA-NPRM at 2, 7-9, which supports creation of a national "do-not-call" registry as long as the registry preempts state laws and the Commission provides an exemption for established business relationships.

[919] *See, e.g.* DSA-NPRM at 6-7; NAR-NPRM at 4; June 2002 Tr. III 157-226.

"do-not-call" registry is not focused on fraud, but rather on consumer privacy. The Commission agrees that the incidence of fraud may be diminished in face-to-face transactions, where the transactions are subject to regulation by other Commission rules or by state regulations. For that reason, the Commission has retained the exemption for face-to-face transactions from the provisions of the Rule that address deceptive or other abusive practices. However, the commenters failed to provide arguments showing why they should be exempted from regulations covering the particular abusive practices set forth in the Commission's proposal—*i.e.*, a national "do-not-call" registry, calling time restrictions, the prohibition against denying or interfering with a consumer's right to be placed on a "do-not-call" list, the requirement to transmit Caller ID information, and the prohibition against threats and intimidation.

NAR argued that Congress intended the TSR to address abusive, deceptive, and fraudulent telemarketing practices, not to regulate or prohibit a single telephone call from a real estate professional that simply provides information to a consumer.[920] Transactions subject to the Commission's amended Rule (and thus subject to the national "do-not-call" registry) are those that fall within the definition of "telemarketing," *i.e.*, "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and

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[920] NAR-NPRM at 1-2. Similarly, DSA notes that many of the calls by direct sellers involve single telephone calls to individuals with whom the seller has a personal relationship. DSA maintains that calls to individuals with whom an on-going commercial or personal relationship exists are reasonable, frequently welcome, and expected by the consumer, and therefore suggests that the Commission provide an exemption for a prior business or personal relationship. DSA-NPRM at 5-8. As discussed above in the section regarding the national "do-not-call" registry, the amended Rule provides an exemption for "established business relationships."

which involves more than one interstate telephone call."[921] A single, isolated telephone call would not be part of a plan, program, or campaign and thus would not fall within the definition of "telemarketing." Furthermore, it is unlikely that the majority of real estate agents conduct campaigns of outbound calls to solicit potential customers who live out-of-state. Most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule's coverage. However, if a real estate agent routinely places outbound calls to solicit potential customers in other states, those calls, in the aggregate, would fall within the definition of "a plan, pattern, or campaign" of outbound calls and would be subject to the Rule.

NAR also argued that a call to set up a meeting does not fall within the definition of "telemarketing" because such calls do not involve the inducement to purchase using the telephone, but rather non-deceptive communication of information about services that are not offered or made available for purchase in a phone conversation.[922] However, the definition of "telemarketing" does not require that the purchase be made during the telephone conversation. The definition simply states that the call be "conducted to induce the purchase of goods or services." The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

In summary, the Telemarketing Act mandates that the Commission's Rule address abusive telemarketing practices and specifically mandates that the Commission's Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive of the consumer's right to

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[921] Amended Rule § 310.2(cc).

[922] NAR-NPRM at 3-4. *See also* ICFA-NPRM at 1-2 (regarding funeral goods and services).

privacy, as well as restrictions on calling times.[923] The rulemaking record shows that face-to-face transactions are not less susceptible to certain abusive practices prohibited in § 310.4.[924] For this reason, the Commission has determined that telemarketing calls to solicit a face-to-face presentation or the purchase of pay-per-call services should be subject to certain Rule provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission retains the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in § § 310.6(b)(1)-(3), but amends the TSR to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (7), and § § 310.4(b) and (c). The amended Rule continues to exempt such calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in § 310.5.[925] These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the payment or donation is made subsequently in a face-to-face setting. However, the amended Rule requires that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

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[923] 15 U.S.C. 6102(a)(1) and (3)(A)-(B).

[924] *See* Gindin-RR at 1; Mey-RR *generally*; DNC Tr. at 241-46; RR Tr. at 291-95.

[925] Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the "safe harbor" defense in § 310.4(b)(3) regarding compliance with the amended Rule's "do-not-call" requirements. The safe harbor relating to abandoned calls, discussed in § 310.4(b)(4), also includes a requirement to maintain certain records.

- threatening or intimidating a customer, or using obscene language;
- failing to transmit Caller ID information;
- causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- denying or interfering with a persons's right to be placed on a "do-not-call" registry;
- calling persons whose telephone numbers have been placed on the national "do-not-call" registry maintained by the Commission, unless an established business relationship exists between the seller and the person (telemarketers seeking charitable solicitations are exempted from this requirement);
- calling persons who have placed their names on that seller's or charitable organization's "do-not-call" list; and
- calling outside the time periods allowed by the Rule.

§ 310.6(b)(4)—Inbound calls not in response to a solicitation

The amended Rule revises § 310.6(b)(4) to expressly except from the exemption any upsell following an exempt transaction initiated by the consumer. When the Commission issued the original Rule in 1995, this exemption was intended to apply to a single telemarketing transaction initiated by the consumer without any solicitation by the seller or telemarketer. Since then, the practice of upselling has emerged, and has grown dramatically, particularly in the inbound telemarketing context. The reasons for exempting a telemarketing transaction pursuant to § 310.6(b)(4) do not apply to an upsell linked to that initial transaction.

Section 310.6(b)(4) of the amended Rule exempts calls initiated by consumers without solicitation by the seller or

telemarketer because such calls are not part of a "plan, program, or campaign to induce the purchase of goods or services."[926] Thus, these calls do not fall within the definition of "telemarketing." The exemption was intended to cover

> incidental uses of the telephone that are not in response to a direct solicitation, *e.g.*, calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain information or customer technical support.[927]

Furthermore, in these calls, the consumer presumably is in control of the transaction that the consumer initiated, absent any outbound call or direct mail piece.

In contrast, the upsell is a direct solicitation for a product or service other than that for which the consumer initiated the call. As such, upsells *are* part of a telemarketing "plan, program, or campaign to induce the purchase of goods or services" and thus *do* fall within the definition of "telemarketing." Furthermore, in upsells, the consumer does not initiate the sales transaction; the sales solicitation is initiated by the seller. When the consumer initiates an unsolicited inbound call, the consumer does not necessarily expect to be offered a good or service during the course of that call (such as in the case of a technical support call), or to be offered additional goods or services (in the case where the consumer was calling to make a purchase). Some commenters suggested that upsells appended to inbound calls should be exempted.[928] However, the Commission's experience indicates that upsells appended to unsolicited inbound calls open the door to potential deception and abuse in the subsequent

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[926] *See* S. REP. NO. 103-80, at 8 (1993).

[927] 60 FR at 43860.

[928] *See, e.g.*, AFSA-NPRM at 15.

upsell transaction.[929] Accordingly, the amended Rule excepts upsell transactions from the exemption provided for unsolicited inbound calls by consumers in § 310.6(b)(4).

There was substantial comment on the potential cost of subjecting upsells associated with inbound calls to any provisions beyond the Rule's disclosure requirements.[930] The original Rule exempted most inbound calls entirely, since most would fall within either this exemption for calls initiated by the consumer, or into renumbered § § 310.4(b)(5) or (6) for general media advertisements or certain direct mail solicitations—each of which is discussed below. As a result, sellers and telemarketers were not required to comply with the Rule's recordkeeping requirements with respect to these exempt telephone calls. While the amended Rule retains these exemptions (although with some modification), upsell transactions are excluded from those exemptions. Thus, to the extent that the Rule requires that records be maintained, including recordings of express verifiable authorization or express informed consent, such records must be maintained regarding these inbound upsells.

Commenters expressed concern primarily about the potential need for sellers and telemarketers to record certain

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[929] Indeed, NAAG noted that the states' law enforcement experience revealed that upsells often proved problematic when appended to inbound calls initiated by the consumer, or by general media advertisements. NAAG-NPRM at 33 ("[Upsells] are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller's products. The upsell can follow either a sales call or a call related to customer service such as a call about an account payment or product repair.") *See, e.g., New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance).

[930] *See, e.g.*, DMA-NPRM at 38; ERA-NPRM at 11; PMA-NPRM at 9-13.

inbound transactions.[931] These commenters suggested that call centers accustomed to handling only inbound telemarketing calls were not necessarily equipped with recording equipment, and that obtaining and implementing the necessary systems would be prohibitively expensive for many such organizations.[932] However, the Commission notes that taping is required only in one circumstance: under new § 310.4(a)(6)(i)(C), the seller or telemarketer must make and maintain a recording of the entire sales transaction any time a telemarketing transaction involves both preacquired account information and a "free-to-pay conversion" feature.[933] In instances where it is necessary to obtain the consumer's express verifiable authorization pursuant to § 310.3(a)(3), the amended Rule provides alternatives to making a recording of the consumer's oral authorization.[934] Thus, the number of industry members who would be required to obtain recording equipment is relatively limited. Moreover, with the growth of digital recording technology, the capital investment in recording equipment and record storage is rapidly declining.[935]

CCC argued that in inbound calls not currently subject to the Rule, the impact of these amendments would be to "unnecessarily increase inbound call length by 50 percent or more and thereby increase the cost of goods or services to consumers."[936] CCC also suggested that additional record-keeping, "public disclosure," and taping requirements will be

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[931] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); June 2002 Tr. II at 232-33 (MPA).

[932] CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); MPA-NPRM at 28-29; June 2002 Tr. II at 232-33 (MPA).

[933] *See* discussion of § § 310.2(o) and (w), and § 310.4(a)(6) above for a detailed explanation of these provisions.

[934] *See* discussion of § 310.3(a)(3) above.

[935] *See* note 480 above.

[936] CCC-NPRM at 16.

overly burdensome.[937] While the Commission recognizes that, to the extent telemarketers have not been subject to the Rule, there is potential for additional burdens, the obligations of the Rule are minimal, and generally reflect regular practices already in place for most sellers and telemarketers in the ordinary course of business—such as the basic disclosure requirements, prohibition on misrepresentations, and recordkeeping requirements.[938] Moreover, the taping requirement is limited to those transactions that involve both preacquired account information and a "free-to-pay conversion" offer. Thus, only those sellers and telemarketers that choose to structure their upselling campaigns in this fashion will be subject to this additional requirement. The Commission therefore believes that any additional burden caused by these new requirements will be minimal. Ultimately, the Commission believes that the benefits to consumers of receiving the appropriate disclosures in an upsell transaction outweigh the costs to industry of providing those disclosures and ensuring that any charges are authorized by the consumer.

Additionally, it should be clear that telephone calls initiated by a customer or donor in response to a telemarketer's transmission of Caller ID information or use of a recorded message under the abandoned call safe harbor provision described in § 310.4(b)(4) are excepted from this exemption, as the customer or donor in this context would have had no reason to initiate a telephone call but for the solicitation efforts of the seller, charitable organization, or telemarketer. The transmission of Caller ID information and the use of a recorded message are considered forms of solicitation by a seller, charitable organization, or telemarketer under this exemption because they are part of a telemarketer's efforts to

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[937] *Id.*

[938] 60 FR at 32682-83 (June 23, 1995).

induce the purchase of goods or services or a charitable contribution. Although the information displayed on a consumer's caller identification service or provided via a recorded message will not include a sales pitch, it is a "result of [a] solicitation" and therefore outside the scope of the exemption described in this section.

310.6(b)(5)—Exemption for general media advertisements

The Commission received few comments addressing its proposal to narrow the general media exemption by adding two additional categories of goods or services to the list of its exceptions: credit card loss protection plans, and business opportunities other than those covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate.[939] The proposed expansion of the exemption to cover charitable solicitations pursuant to the USA PATRIOT Act yielded no comments.

Several of the commenters who addressed the general media exemption opposed having any exemption at all for general media, and therefore supported any effort to narrow it.[940] NCL stated that if the Commission determined to retain the general media exemption it supported the addition of credit card loss protection plans and business opportunities other than those covered by the Franchise Rule to the list of goods and services excepted from the exemption. In support of its position, NCL noted that in 35 percent of the work-at-home complaints made to the NFIC in the year 2001, consumers reported that they were solicited through print media.[941] Since work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception

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[939] This section was found at § 310.6(e) in the proposed Rule.

[940] *See, e.g.*, EPIC-NPRM at 25-26; NCL-NPRM at 12; NAAG-NPRM at 58; June 2002 Tr. III at 177, 182-83 (NAAG has historically opposed the exemption; AARP supports NAAG position).

[941] NCL-NPRM at 12.

from the general media exemption will now ensure that inbound calls in response to general media advertisements touting work-at-home opportunities will be subject to the Rule. NCL also noted that although most of the solicitations for credit card loss protection plans were made by telephone, these services should be covered by the Rule regardless of how they are promoted "given the egregious nature of these complaints."[942]

While commenters and forum participants generally endorsed the proposed narrowing of the general media exemption, some urged the Commission to reconsider whether a general media exemption is "appropriate and workable," arguing that consumers who call in response to such advertisements are vulnerable to fraud and deception unless certain minimal disclosures are made.[943] NCL acknowledged that the Commission could combat such deception using its authority under Section 5 of the FTC Act, but argued that consumer injury could better be prevented if disclosures were required. NCL further advanced the proposition that all telemarketers should be subject to the express verifiable authorization requirements when consumers' accounts will be billed, regardless of whether calls are outbound or inbound, and, in the latter instance, even when such calls are in response to an advertisement delivered by general media or direct mail.[944] EPIC noted its position that "[g]eneral media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule."[945]

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[942] *Id.*

[943] *Id. See also* June 2002 Tr. III at 177-83 (NAAG and AARP).

[944] NCL-NPRM at 12.

[945] EPIC-NPRM at 25-26.

The Commission declines to adopt these recommendations to further regulate inbound calls resulting from general media advertisements. In the SBP issued with the original Rule, the Commission explained that in its experience "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."[946] The Commission's experience since the promulgation of the Rule continues to support the exemption for general media advertising, with targeted exceptions for certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls. In response to the suggestion that express verifiable authorization be required in all telemarketing transactions when the consumer's account will be billed, the Commission notes that the parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3).[947]

NAAG expressed concern about the growing number of sellers of membership or buying club opportunities that operate using an "upsell" technique after an initial inbound call is placed by consumers in response to an advertisement for a completely different product.[948] NAAG suggested that the Commission amend the general media exemption to ensure that the Rule does not inadvertently exempt upselling transactions that occur when a consumer calls a seller or telemarketer in response to a general media advertisement.[949]

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[946] 60 FR at 43860.

[947] The Commission also notes that new § 310.4(a)(6) requires that, in every instance, a seller or telemarketer secure the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account.

[948] NAAG-NPRM at 58-59.

[949] *Id. See also* EPIC-NPRM at 25 (agreeing that upselling calls should be subject to the Rule). *Cf.* Capital One-NPRM at 5 (requesting clarification that upselling calls are exempt, at least in an internal upsell).

The Commission agrees that this scenario would be an unwelcome consequence of the provision's wording and thus has amended this provision to clarify that the exemption may not be claimed in any instances of upselling that occur in the call.

NAAG also recommended that the list of exceptions to the general media exemption be expanded to include other transactions that involve a high risk of abuse, such as discount buyers clubs and offers involving "opt out free trials."[950] The Commission agrees that the telemarketing of these products or services frequently involves fraudulent or deceptive practices. However, there is no evidence on the record indicating that these products or services are telemarketed through general media advertisements. Rather, the states and the Commission have brought law enforcement actions challenging the deceptive telemarketing of these products predominantly when they are sold via outbound cold calls or in upselling, after the consumer has called to purchase another product or service in response to a general media advertisement.[951] As discussed above, the amended Rule contains a modified general media exemption, which makes the exemption unavailable to upselling transactions that occur in a call in response to a general media advertisement. In addition, the amended Rule contains specific requirements for negative option, "free-to-pay conversion," and upselling

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[950] NAAG-NPRM at 59.

[951] *See, e.g., FTC v. Smolev.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, No C8-99-10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997).

transactions.[952] Therefore, the Commission finds it unnecessary to except discount buyers clubs and offers involving "opt out free trials" from the general media exemption.

DSA opposed the amendment of the general media exemption provision, expressing the concern that the exception for "business opportunities other than business arrangements covered by the Franchise Rule" will require individual direct sellers to comply with the Rule when they solicit customers or salespeople through general media advertisements.[953] DSA argues that "[t]here is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity" and that "there should be even fewer concerns about communications related to prospective transactions involving activities clearly deemed de minimis by the Franchise Rule."[954] As the Commission stated in the NPRM, it has determined, based on the record and in particular on its extensive law enforcement experience in this area, that "telemarketing fraud perpetrated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon."[955] Outbound telephone calls to induce the purchase of a business opportunity not regulated by the Franchise Rule have been subject to the Rule's coverage since it was promulgated, and the new exception for general media advertisements merely expands that requirement when an inbound call results from

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[952] *See* amended Rule § § 310.3(a)(1)(vii), 310.3(a)(2)(ix), 310.3(a)(3)(iii), 310.4(a)(6), 310.4(a)(7), and 310.4(d).

[953] DSA-NPRM at 8-9.

[954] *Id.*

[955] 67 FR at 4530-31 (this determination is equally applicable to the advertisement by direct mail of business opportunities other than business arrangements covered by the Franchise Rule).

the advertisement of such ventures in the general media.[956] Moreover, if a direct seller is marketing its underlying product to customers, the exception would not bring such activity under the Rule because it would not implicate the sale of a business opportunity.[957] Furthermore, as the Commission noted in the SBP for the original Rule, DSA's concern about recruitment of persons to engage in the direct sale of goods or services is likely unfounded because the face-to-face exemption takes such efforts outside the Rule's coverage.[958]

Based on its review of the record in this matter, and its law enforcement experience, the Commission has determined to retain the proposed general media provision in the amended Rule with two changes. First, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time. Second, § 310.6(b)(5) has also been amended to expressly except from the general media exemption any upsell following the exempt transaction associated with the general media solicitation. As with telephone calls initiated by the consumer without any solicitation by the

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[956] The Commission noted in the original SBP that "[w]hen a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections." 60 FR at 4360. The addition of the exception provisions to the direct mail and general media exemptions merely expands upon the initial requirement.

[957] For example, the exception to the general media exemption would bring under the Rule an effort by a direct seller to recruit others to market its products, but not the sale by the direct seller of cosmetics to its own end-customers.

[958] 60 FR at 43860, n.185.

seller or telemarketer, the reasons for exempting a telemarketing transaction following certain general media solicitations do not apply to an upsell linked to that initial transaction.[959] The original Rule exempts calls in response to a general media advertisement because "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."[960] However, the Commission recognized that some fraudulent telemarketers and sellers have used general media advertisements to entice victims to call, and thus has excepted those problem areas from the exemption. Upselling is one of the problem areas where general media advertisements have provided the opening for subsequent deception and abuse.[961] In addition, an upsell transaction is not similar to a general media advertisement. It is a wholly new sales offer targeted at the consumer a seller or telemarketer has on the line for some other purpose, whether it be in response to a general media advertisement about a different product or service, or a customer service call initiated by the consumer. Accordingly, the amended Rule excepts upsell transactions from the general media exemption in § 310.6(b)(5).

§ 310.6(b)(6)—Exemption for direct mail solicitations

Section 310.6(b)(6) of the original Rule exempts from the Rule's requirements inbound telephone calls resulting from a direct mail solicitation that clearly, conspicuously, and truthfully disclosed all material information required by § 310.3(a)(1). Certain categories of transactions, specifically

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[959] The reasons for this exception are explained in greater detail in the discussion of amended Rule § 310.6(b)(4) above.

[960] 60 FR at 43860.

[961] *FTC v. Smolev* (a/k/a Triad Discount Buying Service) is one example of an internal upsell triggered by consumer response to a general media advertisement. *Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). *New York v. Ticketmaster* (Settlement announced on Jan. 7, 2002).

those in which the solicitation was for a prize promotion, investment opportunity, credit repair service, "recovery" service, or advance fee loan, were excepted from this exemption because the record and the Commission's law enforcement experience made clear that these particular products and services were so often subject to abuse by fraudulent telemarketers that regulation under the TSR was appropriate.

The proposed Rule retained the direct mail exemption provision, but clarified that advertisements sent via facsimile or electronic mail were considered direct mail for purposes of this exemption.[962] The proposed Rule also added two new categories of transactions to be excepted from the direct mail exemption: credit card loss protection plans and business opportunities other than those covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate. Finally, pursuant to the USA PATRIOT Act, the proposed Rule expanded the exemption to exclude from the Rule's coverage inbound calls to solicit a charitable contribution made in response to a direct mail solicitation that complies with § 310.3(a)(1).

The Commission has determined, based on a review of the record and its own law enforcement experience, to adopt the proposed amendments to the direct mail exemption, renumbered in the amended Rule as § 310.6(b)(6). The amended Rule, however, differentiates between the requirements for direct mail solicitations for goods or services and direct mail solicitations for charitable contributions. The amended Rule retains unchanged the requirements of the original Rule—*i.e.*, the direct mail solicitation must clearly, conspicuously, and truthfully disclose all material information required by § 310.3(a)(1). However, because § 310.3(a)(1) applies only to goods and services and not to charitable solicitations, the

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[962] The direct mail exemption provision is found in the proposed Rule at § 310.6(f).

amended Rule modifies the direct mail exemption language to ensure that prospective donors who receive direct mail solicitations for charitable contributions have protections similar to those enjoyed by consumers who purchase goods or services. Thus, the amended Rule adds language to the direct mail exemption provision prohibiting material misrepresentations regarding any item contained in § 310.3(d) in charitable solicitations sent by direct mail to donors.

In the proposed Rule, the Commission stated that the direct mail exemption would be applicable to inbound calls made in response to a direct mail charitable solicitation that complies with § 310.3(a)(1). NAAG suggested that inbound calls resulting from a direct mail charitable solicitation be exempt instead if the direct mail piece clearly, conspicuously, and truthfully sets forth the disclosure in § 310.4(e)(1) (the identity of the charitable organization) and the fact that the organization is soliciting a charitable contribution.[963] NAAG further recommended that, at a minimum, several categories of information (including the nature of the goods or services and the facts relating to a charitable contribution) deemed important to consumers and donors be expressly referenced in § 310.6(f).[964] The Commission agrees that the specific disclosures required by § 310.3(a)(1)—targeted at the sale of goods or services—are an imperfect fit with the type of information a potential donor would need to determine if he or she wished to contact a charitable organization in response to a solicitation received via direct mail. Therefore, the amended Rule requires that, in order for the telemarketer to take advantage of the direct mail exemption for inbound calls in response to any direct mail charitable solicitation, such solicitation contain no material misrepresentation regarding any item contained in § 310.3(d) of the Rule.

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[963] NAAG-NPRM at 59-60.

[964] *Id.*

Section 310.6(b)(6) has also been amended to expressly except from the direct mail exemption any upsell following the exempt transaction associated with the direct mail advertisement. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, or in response to general media solicitations, the reasons for exempting a telemarketing transaction triggered by a direct mail advertisement do not apply to an upsell linked to that initial transaction.[965] Section 310.6(b)(6) of the amended Rule exempts direct mail solicitations only if the disclosures required by § 310.3(a)(1) are truthfully, clearly, and conspicuously provided in the direct mail piece. The Commission exempted these direct mail solicitations because such solicitations

> are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly related to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption.[966]

Upselling transactions are one of the problem areas where direct mail solicitations have provided the opening for subsequent deception and abuse.[967] Upon receiving a direct mail solicitation in which all of the material terms of the offer

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[965] The reasons for this exception are discussed in greater detail in the explanation of §§ 310.6(b)(4) and (5) above. Capital One requested clarification of the applicability of this exemption to upselling transactions. Capital One-NPRM at 5-6. EPIC requested that upselling be subject to the Rule. EPIC-NPRM at 25.

[966] 60 FR at 43860.

[967] *See, e.g., United States v. Prochnow*, No. 1 02-cv-917 (N.D. Ga. 2002).

may be available to evaluate in the direct mail piece, the consumer has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase. By contrast, an upsell presentation provides the consumer no opportunity to review the material disclosures pertinent to the offer. Once again, the upsell is more akin to an unsolicited outbound call to the consumer, who does not necessarily expect to be solicited for a purchase, and who has none of the material information he or she needs to evaluate the offer and make a purchasing decision. Accordingly, the amended Rule excepts upselling transactions from the direct mail exemption in § 310.6(b)(6).

Finally, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time.

Facsimile and electronic mail solicitations as "direct mail": NCL and ARDA supported the Commission's view that facsimile and electronic mail solicitations are analogous to direct mail sent via the U.S. Postal Service, and should be considered direct mail for purposes of the exemption.[968] NCL noted that facsimile ("fax") or electronic mail ("email") solicitations are often sent to promote fraudulent goods or services.[969] For example, in "Nigerian money offer" schemes, the fastest growing category of telemarketing fraud reported to NCL, faxes and emails are the primary methods of solicitation.[970] NCL noted that faxes and email are also used

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[968] *See* ARDA-NPRM at 17; NCL-NPRM at 12.

[969] *See* NCL-NPRM at 12.

[970] *Id.*

to solicit businesses for a variety of telemarketing scams.[971] DMA also supported the interpretation that advertisements sent via fax or email should be considered as "direct mail" pieces for purposes of the Rule.[972]

Some commenters opposed the inclusion of fax and email advertisements in the exemption,[973] and some expressed concern that the Commission's interpretation could actually increase the number of unwanted solicitations sent to consumers by fax and email.[974] NCL stated that unsolicited fax advertisements were prohibited under the TCPA because of their intrusive impact on recipients' privacy, and expressed concern that exempting calls in response to unsolicited faxes from the Rule, even if the information in them is accurate and complete, "would ignore this important public policy determination."[975] NCL recommended that the Commission ban the sending of unsolicited fax advertisements as an abusive practice under the Rule.[976]

The record in this matter provides no support for the assertion that the number of unwanted, but truthful, fax and email solicitations may increase as a result of being exempted from the TSR. The Commission notes that the TCPA, enforced by the FCC, already bans unsolicited fax messages.[977] The FCC has promulgated rules effectuating the

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[971] *Id.*

[972] *See* DMA-NPRM at 56.

[973] *See, e.g.*, EPIC-NPRM at 26.

[974] *See, e.g.*, CNO-NPRM at 6; NCL-NPRM at 12.

[975] *See* NCL-NPRM at 12-13.

[976] NCL-NPRM at 13.

[977] 47 U.S.C. 227(b). In its recent Notice of Proposed Rulemaking, the FCC noted that complaints about unsolicited faxes have been steadily increasing, from 519 in 1996 to over 2100 in 2000. FCC TCPA 2002 (see note 633 above), at para. 8. There is no suggestion in the FCC's NPRM that a spike in the actual number of unsolicited faxes has occurred or that

Congressional ban and has enforced those regulations.[978] Thus, the Commission's determination that, for the purposes of the TSR, faxes and email are forms of "direct mail" should have no impact on the number of unsolicited faxes that are sent. To presume such would be to anticipate that sellers would blatantly ignore the FCC's regulations. To be entirely clear, however, the Commission wishes to state that its interpretation of the term "direct mail" in no way alters the legality of the underlying direct mail contact. Rather, the new TSR provision will require that, to the extent that a fax or email solicitation is allowed by law, these direct mail solicitations must include the required disclosures, or else resulting inbound calls from consumers will be subject to the entire TSR.[979]

Although it favored the Commission's proposed interpretation which viewed faxes and email as "direct mail" for purposes of the Rule, DMA argued that the Rule should allow the disclosures of material information to be made in the telephone call, rather than in the fax or email advertisement.[980] As support for its position, DMA stated that to do otherwise could result in increased expense to sellers who use

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any increase is attributable to the FTC's determination that faxes and email are forms of direct mail for purposes of the TSR.

[978] 47 CFR 64.1200(a)(3). *See also* FCC Press Release: "FCC Cracks Down on 'Junk Fax' Violations," http://www.fcc.gov/cgb/news/080802.junkfax.html; FCC's 2002 NPRM at para. 7, n.40.

[979] If the fax or email advertisement is sent in violation of state or other federal law, the sender would be liable under those federal or state laws, but not under the TSR, unless the fax or email also failed to include the requisite disclosures and the seller or telemarketer, in any subsequent telemarketing effort, failed to abide by the Rule.

[980] DMA-NPRM at 58 ("The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer."). *See also* Associations-NPRM at 4; Associations-Supp. at 8.

email to reach their target audience, due to the increased length of the message. DMA further argued that the Commission lacks authority to dictate the content of either email or fax advertisements. Finally, DMA posited that, if the intent of the provision is to mandate disclosures, the NPRM failed to evaluate the costs of requiring such disclosures, particularly in email solicitations.[981]

The Commission believes that, to warrant exemption of the inbound call in response to a direct mail solicitation from the Rule, it is critical that a consumer receive the required disclosures (or, in the case of a charitable solicitation, that the solicitation not contain misrepresentations) at the time the consumer contemplates contacting the seller or charitable organization by telephone. The amended Rule follows the reasoning of the original Rule, which requires that any direct mail solicitation contain the required disclosures in order to afford the consumer an opportunity to know certain material information before determining whether to call the telemarketer. Apart from DMA's comment, the Commission finds no record evidence to support alteration of this requirement simply because the direct mail solicitations are sent by email rather than the U.S. Postal Service. It is not the intent of the Commission to use this provision to require new disclosures surreptitiously; indeed, the disclosures required (and misrepresentations prohibited, in the case of a charitable solicitation) are merely those that a telemarketer must make in the course of any non-exempt telemarketing transaction.

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[981] In their supplemental comment, Associations, of which DMA is a member, noted only that inclusion of the required disclosures in an email or fax "imposes significant costs on businesses. Particularly on email communications, 'real estate' and location have significant financial value." Associations-Supp. at 8. This mere assertion remains all that exists on the record regarding the cost of requiring the § 310.3(a)(1) disclosures in an email or fax, and the Commission finds this insufficient to cause it to reconsider its position based on the financial harm argument asserted by Associations.

Sellers remain free to choose the most advantageous method by which to contact consumers, and those opting for direct mail solicitations sent by email must determine whether the costs of making the relevant disclosures[982] are offset by the savings attained by being exempt from the rest of the Rule.

Exceptions to the direct mail exemption: Commenters were generally supportive of the Commission's proposal to narrow the direct mail exemption to make it unavailable to sellers of credit card loss protection and business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may adopt. In expressing its support, NCL noted that, although most solicitations for credit card loss protection plans were made via outbound telephone calls, it endorsed excepting such plans from the exemption to ensure that they will be covered by the Rule regardless of how they are promoted.[983] Similarly, NCL supported the exclusion from the direct mail exemption of work-at-home solicitations, noting that in 2001, 42 percent of the victims of work-at-home scams said that the initial method of contact was direct mail.[984] Because work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the direct mail exemption will now ensure that inbound calls in response to direct mail advertising work-at-home opportunities will be subject to the Rule.

Some consumer advocates and law enforcement officials argued, however, that by simply narrowing the categories of offers eligible for the exemption, the proposed Rule did not

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[982] Presumably in the solicitation of a charitable contribution, there is no cost associated with refraining from making misrepresentations.

[983] NCL-NPRM at 12.

[984] *Id.*

go far enough to protect consumers.[985] Instead of narrowing the exemption, NCL recommended that the Commission eliminate the direct mail exemption altogether,[986] a position with which NAAG and AARP concurred at the June 2002 Forum.[987] NCL argued that telemarketing fraud and abuse could be prevented if those currently exempt from the Rule's coverage were required to adhere to its provisions, particularly those Rule provisions mandating material disclosures and express verifiable authorization.[988] As an alternative to eliminating the direct mail exemption, NCL suggested that all telemarketers should be required to obtain customers' express verifiable authorization in every call, even those that would otherwise be exempt, such as inbound calls in response to a direct mail solicitation.[989] NAAG suggested that the Rule should also except from the direct mail exemption transactions that involve a high risk of abuse, such as the sale of memberships for discount buyers clubs and for transactions involving negative option features.[990]

Based on a review of the record, the Commission declines to adopt these suggestions. In the SBP of the original Rule, the Commission noted that the direct mail exemption was included in the Rule because, in its experience, direct mail solicitations were not "uniformly related to the forms of deception and abuse the Act seeks to stem."[991] Based on this understanding, and in an effort to strike the appropriate

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[985] *See* NCL-NPRM at 12 (expressing concern that increasing the number of exceptions to exemptions is confusing to businesses and consumers).

[986] NCL-NPRM at 12.

[987] June 2002 Tr. III at 177, 182-83.

[988] NCL-NPRM at 12.

[989] *Id.*

[990] *See* NAAG-NPRM at 59.

[991] 60 FR at 43860.

balance between reining in fraudulent telemarketers and not unduly burdening legitimate industry, the Commission included the direct mail exemption in the original Rule. While it may be true that fraudulent telemarketing scams might be reduced if the direct mail exemption were excised from the Rule, the Commission believes that to do so would tip the balance and unnecessarily burden legitimate telemarketers without bringing commensurate benefits to consumers. Therefore, the Commission declines to eliminate the exemption entirely.

The Commission also declines to require express verifiable authorization in all calls. The parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3). Finally, the Commission declines to add the sale of discount buyers club memberships and solicitations in which there is a negative option feature to the exceptions to the direct mail exemption. The record does not demonstrate that the sale of membership clubs or solicitations in which there is a negative option feature are particularly subject to abuse in conjunction with direct mail solicitations, and thus does not support including such exceptions.[992]

Other suggested changes

Some commenters raised concerns about the situation where there is a disparity between the disclosures made in a direct mail solicitation and those made in the subsequent telephone call. NAAG urged the Commission to clarify that a

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[992] The record does show that buyers club memberships have frequently been associated with complaints regarding preacquired account telemarketing, a practice that is addressed by amended Rule § § 310.4(a)(5) and (6). Similarly, goods or services offered in conjunction with a "free-to-pay conversion" negative option feature have been shown to result in complaints of unauthorized charges, and are addressed by amended Rule § 310.4(a)(6) and § § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

pre-call mailing is not truthful if it is inconsistent in some material way with what is stated during the call.[993]

In order to avail itself of the exemption, a direct mail solicitation must provide the material disclosures required by § 310.3(a)(1) to ensure that the material information about the offer is in the hands of the consumer when the consumer elects whether to place a call to a telemarketer, including information about the total cost and quantity of the goods or services, all material restrictions, limitations or conditions to the offer, and certain information regarding refund policies and prize promotions. By its very definition, this material information is presumed "likely to affect a person's choice of goods or services, or their conduct regarding them."[994] Thus, in order to meet the Rule's requirement that the information in the direct mail solicitation be "truthful," the information provided to the consumer in the telemarketing call should not vary in any material respect from the disclosures provided in the direct mail solicitation.[995]

AFSA expressed concern over the "specter of vicarious liability" for telemarketers who receive inbound calls in response to direct mail solicitations sent by another party in which the required disclosures are not made "truthfully." The Commission believes that under § 310.3(b), the assisting and facilitating provision, liability would only attach if a telemarketer knew or consciously avoided knowing that there was a disparity between the material representations in a

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[993] NAAG-NPRM at 59-60.

[994] *Cliffdale*, 103 F.T.C. at 165.

[995] The Commission recognizes that, in some instances, prices may be subject to change, or may only be in effect for a specified period of time. A [disclosure to that effect in the direct mail solicitation should provide the consumer with sufficient notice that the price may fluctuate or may not be available after a particular date.

direct mail piece and the telemarketing script being used in inbound calls in response to that solicitation.

EFSC requested, in connection with the proposal to broaden the direct mail provision to include solicitations by email and fax, that the Commission explicitly state that "a telemarketer's electronic disclosure of the material information satisfies" the telemarketer's obligation under the Rule.[996] EFSC argued that the E-SIGN Act makes such electronic disclosures permissible, and that the Commission should explicitly state that such is the case.[997] As noted above, in the response to DMA's suggestion that it should be permissible to make the required disclosures in the email or fax or in the subsequent telemarketing call, the Commission believes that to avail itself of the direct mail exemption, the seller must include the required disclosures in the direct mail piece itself, for to make these disclosures outside that context would defeat the consumer protection purpose of that requirement.[998] Thus, for the same reason, the Commission believes that in the case of any direct mail solicitation conveyed by email or fax, the required disclosures would

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[996] EFSC-NPRM at 12.

[997] *Id.*

[998] The Commission believes that for purposes of § 310.6(b)(6), it is critical that telemarketing calls in response to direct mail solicitations be exempt only on the condition that the direct mail piece contains the requisite disclosures. The requirement that these disclosures be displayed in the direct mail piece itself ensures that these disclosures are proximate in time and location to the direct mail solicitation, which makes it more likely that consumers will be made aware of certain material information that is useful or necessary to evaluate the sales transaction proposed in the solicitation before responding to it. The Commission notes that this outcome is consistent with § 101(f) of the E-SIGN Act, which states that, "Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, *disclosure*, or other record required to be posted, *displayed*, or publicly affixed." (emphasis added).

have to be included in the email or fax itself in order for any subsequent telemarketing call to benefit from the § 310.6(b)(6) exemption.

Finally, NFC requested that the Commission clarify whether the direct mail exemption applies to franchisors.[999] The Commission believes that § 310.6(b)(2) makes clear that sales of franchises subject to the Commission's Franchise Rule are exempt from the TSR. The sale of business opportunities not covered by the Franchise Rule, however, is subject to regulation by the Rule. Section 310.6(b)(6) of the amended Rule expressly states that a seller of "business opportunities other than business arrangements covered by the Franchise Rule" would not be able to avail itself of the direct mail exemption, and thus would be required to comply with the Rule's provisions. Therefore a business opportunity seller, if not eligible for exemption pursuant to § 310.6(b)(2), would be ineligible for the direct mail exemption because of the specific exception for the sale of such services under § 310.6(b)(6).

§ 310.6(b)(7)—Business-to-business telemarketing

Section 310.6(g) of the original Rule exempts from the Rule's requirements telemarketing calls to businesses, except calls to induce the sale of nondurable office or cleaning supplies. Based on the Commission's law enforcement experience, the Commission proposed in the NPRM to add two more categories to the list of exceptions to the exemption for calls to businesses: the sale of Internet or Web services, and charitable solicitations.[1000] The Commission has determined, however, based upon comments received in response to the NPRM, not to include in the amended Rule the exception of the sale of Internet or Web services and

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[999] NFC-NPRM at 4-5.

[1000] *See* NPRM discussion regarding proposed § 310.6(g), 67 FR at 4531-32.

charitable solicitations from the business-to-business exemption. The amended Rule retains unchanged the wording in the original Rule, except to add language clarifying that the Commission's national "do-not-call" registry provisions do not apply to the telemarketing of nondurable office or cleaning supplies to businesses. The provision is also renumbered, and can be found at § 310.6(b)(7) of the amended Rule.

Consumer groups and state law enforcement officials argued that the Rule should not contain any exemption for business-to-business telemarketing, but if the Commission were to retain the exemption, they supported narrowing the exemption as much as possible so that sellers and telemarketers of those products or services that have particularly been subject to abuse would not benefit from the exemption.[1001] Thus, these commenters generally supported the Commission's proposal to "carve out" the telemarketing of Internet and Web services from the business exemption, citing extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of website design, hosting, and maintenance services to small businesses.[1002]

On the other hand, industry commenters uniformly opposed the "carve out" of Internet and Web services from the business-to-business exemption.[1003] These commenters argued that the proposed definitions of these services were overly broad and that there was insufficient record evidence

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[1001] *See, e.g.*, NAAG-NPRM at 60; NCL-NPRM at 11.

[1002] NAAG-NPRM at 60; NCL-NPRM at 11.

[1003] *See, e.g.*, Comcast-NPRM at 5; Cox-NPRM at 30-32; ICC-NPRM at 1-2; Nextel-NPRM at 23, 24; Reed-Elsevier-NPRM at 5; SBC-NPRM at 2, 13; SIIA-NPRM at 1-2; YPIMA-NPRM at 5. *See also* June 2002 Tr. III at 210-20, 222-23, 226.

to support regulation of all Internet and Web services.[1004] They noted that federal and state law enforcement efforts had focused on website design, development, hosting, and maintenance services, but that the record does not reveal a pattern of fraud in the sale of Internet access services, including wireless Internet access services.[1005] Industry commenters argued that if the Commission persisted in requiring that the telemarketing of Internet and Web services comply with the TSR, the effect would be to chill innovation and development in a nascent industry that is rapidly changing.[1006] They also argued that such an action would be anticompetitive because it would subject those sellers and telemarketers who are within the FTC's jurisdiction to the TSR's requirements, while exempting competitors who happen to be common carriers.[1007] Furthermore, these commenters stated that although the Commission's goal is to protect small business from fraud in the sale of Internet and Web services, the Commission's proposal would actually harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.[1008] Industry commenters argued that current law enforcement tools, coupled with active industry

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[1004] *See, e.g.*, Nextel-NPRM at 23; SBC-NPRM at 3; SIIA-NPRM at 1-2. June 2002 Tr. III at 210-20, 222-23, 226.

[1005] *See, e.g.*, Nextel-NPRM at 23; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1006] Nextel-NPRM at 24; Reed-Elsevier-NPRM at 7; SBC-NPRM at 14; SIIA-NPRM at 1-2. *See also* June 2002 Tr. III at 210-24.

[1007] *See, e.g.*, DMA-NPRM at 9. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1008] *See, e.g.*, SBC-NPRM at 15; SIIA-NPRM at 2. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

self-regulation, are sufficient to challenge deceptive and fraudulent telemarketing of Internet or Web services.[1009]

The Commission finds persuasive industry's arguments that the proposal to make the business-to-business exemption unavailable to telemarketing of Internet and Web services is overbroad and likely to produce perverse results for the small businesses it was intended to protect. The Commission believes that, although coverage by the Rule would provide benefits to law enforcement efforts, current federal and state consumer protection statutes have been effective tools in challenging fraudulent practices in this industry.[1010] Furthermore, the Commission believes that it is preferable to move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution. Therefore, the Commission has removed the proposed exception for Internet and Web services sales to businesses by telephone, which will continue to be exempt from the Rule's coverage. The Commission will, however, continue to monitor closely the

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[1009] *See, e.g.*, Reed-Elsevier-NPRM at 4-5 (noting, for example, that industry has adopted the Best Billing Practices guidelines set forth by the FCC to address unauthorized billing or "cramming" problems); SBC-NPRM at 14. *See also* June 2002 Tr. III at 213-14, 217-18, 224.

[1010] *See E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cramming Before the Senate Committee on Small Business* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); FTC Press Release: "FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions," June 17, 1999, http://www.ftc.gov/opa/1999/small9.htm. *See also, e.g., FTC v. Shared Network Servs., LLC.*, No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered Oct. 25, 1999); *FTC v. WebViper LLC*, No. 99-T-589-N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

practices in the telemarketing of Internet and Web services, and may revisit this issue in subsequent Rule Reviews should circumstances warrant.

Consumer groups and state law enforcement officials also supported the Commission's proposal to make the business-to-business exemption unavailable to entities soliciting charitable contributions, citing the extensive problems with telefunders soliciting on behalf of public safety organizations (so-called "badge fraud" operators) who often target small businesses.[1011] DMA-NonProfit and Not-For-Profit Coalition were among the few non-profit organizations that addressed the business-to-business exemption,[1012] arguing that the legislative history of the USA PATRIOT Act does not support extending the Rule's coverage to charitable solicitations directed to businesses, particularly in the absence of substantial evidence of abuse.[1013] As discussed above, the Commission already has determined to exempt telemarketing on behalf of charitable organizations from the national "do-not-call" registry, thus addressing the principal concern of the non-profit organizations.

The Commission notes that "badge fraud" telemarketing directed at businesses has been a particularly pernicious practice that has been attacked on a regular basis by both the

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[1011] *See, e.g.*, NAAG-NPRM at 60-61; NCL-NPRM at 11. *See also* June 2002 Tr. III at 224-25.

[1012] Most non-profit organizations commented on the application of the national "do-not-call" registry to their solicitation efforts, not on whether they should be otherwise excepted from the business-to-business exemption. *See, e.g.*, Childhood Leukemia-NPRM at 1; Community Safety-NPRM at 1-2; California FFA-NPRM at 1-2; FPIR-NPRM at 1-2; HRC-NPRM at 1-2; OSU-NPRM at 1; SO-AZ-NPRM at 1-2.

[1013] *See* DMA-NonProfit-NPRM at 14-15; Not-for-Profit Coalition-NPRM at 46-48. There is scant legislative history on the USA PATRIOT Act with regard to this issue.

Commission and state regulators.[1014] Commenters have made it clear, however, that many legitimate non-profit organizations rely heavily on business contributions as a major portion of their donor base.[1015] The Commission seeks to protect businesses—particularly small businesses—from fraudulent fundraising, without burdening legitimate non-profit organizations with the cost of complying with unnecessary regulations. As some commenters pointed out, many legitimate non-profit organizations operate on a very narrow margin, and such costs may have a very significant impact on the viability of an organization's fundraising efforts or even the very viability of the organization itself.[1016]

The Commission also notes that law enforcement actions attacking badge fraud under Section 5 and analogous state laws have been effective on a case-by-case basis.[1017]

[1014] *See, e.g., FTC. v. Southwest Mktg. Concepts, Inc.*, No. H-97-1070 (S.D. Tex. filed 1999) (Stipulated Final Judgment and Order for Permanent Injunction and Monetary Relief entered May 28, 1999); *FTC v. Saja*, No. CIV-97-0666 PHX SMM (D. Ariz. filed Apr. 1997); *FTC v. Dean Thomas Corp., Inc.*, No. 1:97CV0129 (N.D. Ind. 1997) (Stipulated Final Judgment entered Jan. 19, 1998); *FTC v. Century Corp.*, No. 1:97CV0130 (N.D. Ind. filed Apr. 7, 1998) (Stipulated Final Judgment and Order entered April 8, 1998); *FTC v. Image Sales & Consultants*, Inc., No. 1:97CV0131, (N.D. Ind.) (Stipulated Final Judgment and Order entered June 9, 1998); *FTC v. Omni Adver., Inc.*, No. 1:98CV0301 (N.D. Ind. filed Oct. 9, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98CV0300, (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Adver. Unlimited, Inc.*, No. 1:98CV0302 (N.D. Ind. filed Oct 5, 1998); *FTC v. Gold*, No. CV 99-99-2895-WDK (AIJx) (C.D. Calif. filed 1998); *FTC v. Eight Point Communications, Inc.*, No. 98-74855 (E.D. Mich. filed Nov. 10, 1998). *See also* Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

[1015] *See, e.g.*, DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*. *See also* June 2002 Tr. III at 110, 205-10, 220-21.

[1016] *Id.*

[1017] *See* note 1015 above.

Furthermore, several of the entities that were targets of these law enforcement efforts also telemarketed to individuals, which would bring them within the purview of the amended Rule with respect to those transactions.[1018] In addition, the Commission recognizes that there are many legitimate public safety organizations that solicit funds for their charitable purposes in a non-deceptive manner. Therefore, the Commission believes that the more prudent course is to continue to rely upon its authority under Section 5 and the states' authority under their analogous laws to address fraudulent fundraising, and, at this time, to leave beyond the scope of the TSR legitimate charitable fundraising directed to businesses. This issue could be revisited in subsequent Rule Reviews should evidence develop that the Commission has not struck the correct balance in making this determination.

Other recommendations by commenters

Some commenters recommended that the Rule be amended to include more exemptions. For example, several commenters advocated that their industry be exempt from compliance with the national "do-not-call" registry and/or from all of the Rule's provisions.[1019] The Commission notes that many of those who requested exemptions already are

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[1018] *See, e.g., Saja*, No. CIV-97-0666 PHX SMM; and *Fight Point Communications*, No. 98-74855.

[1019] *See, e.g.*, Tribune-NPRM at 2-3 (exempt newspapers because of their "unique position and mission in our society"); Herald Bulletin-NPRM at 1 (exempt newspapers); CNHI-NPRM at 1-2 (exempt newspapers); AFSA-NPRM at 10 (exempt debt collection calls); ACA-NPRM at 2-4 (expressly exempt debt collection activities from the Rule); DBA-NPRM at 5 (expressly exempt debt collectors from the "do-not-call" registry provision); AFSA-NPRM at 14 (exempt financial services companies with an established business relationship); CASE-NPRM at 3 (exempt educational institutions from "do-not-call" registry provision); ANA-NPRM at 7 (explicitly exempt market researchers); Green Mountain-NPRM *passim* (exempt energy marketers).

exempt from the Rule and, therefore, there is no reason to expressly restate that exemption in the Rule.[1020] The Commission also declines to add additional exemptions on behalf of specific industry segments, with the exception of charitable organizations. As noted above in the discussion on exempting charities from compliance with the national "do-not-call" registry provision, the Commission believes that charitable solicitations present unique circumstances that make an exemption necessary and appropriate. The Commission declines, however, to introduce further limitations to the applicability of the "do-not-call" registry because it believes such action would be inconsistent with the privacy mandate of the Telemarketing Act and would likely result in consumer confusion and frustration.

G. Section 310.7 —Actions by States and Private Persons.

Section 310.7 in the original and proposed Rules sets forth the procedures by which the states and private persons may bring actions under the Rule, as is provided for in the Telemarketing Act.[1021] In the NPRM, the Commission noted that it received no comments directly on this section, but that commenters were generally supportive of the Rule's enforcement scheme allowing the Commission, the states, and private parties to bring actions under the TSR.[1022] The Commission noted that the record at that time contained evidence of two sources of frustration regarding enforcement of the Rule: 1) the $50,000 monetary threshold required for a

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[1020] For example, debt collection and market research activities are not covered by the Rule because they are not "telemarketing"—*i.e.*, they are not calls made "to induce the purchase of goods or services." Of course, if the debt collection or market research call also included an upsell, the upsell portion of the call would be subject to the Rule as long as it met the criteria for "telemarketing" and was not otherwise exempt from the Rule.

[1021] 15 U.S.C. 6103 (states) and 6104 (private persons).

[1022] 67 FR at 4532-33.

private party to bring suit under the Rule; and 2) the difficulty in identifying Rule violators, particularly those who violate the abusive practices section of the Rule.[1023] The Commission noted then that the amount in controversy requirement was included in the Telemarketing Act, and it is therefore up to Congress to make any change to this amount.[1024] With regard to the difficulty in identifying violators, the Commission expressed its belief that two proposed provisions—the prohibition on blocking Caller ID information, and the prohibition on denying or interfering with a consumer's right to be placed on a "do-not-call" list—would be beneficial in addressing these concerns.[1025]

The Commission received no comments on this section in response to the NPRM, and thus no modifications are included in the amended Rule.[1026]

[1023] 67 FR at 4533.

[1024] *Id.*

[1025] *Id.*

[1026] Some commenters did advocate for meaningful Rule enforcement, including random monitoring and publicity regarding enforcement. *See* AARP-NPRM at 10 (meaningful enforcement and publicity); EPIC-NPRM at 27 (suggesting random monitoring and also recommending registration and bonding requirements, which the Commission declines to adopt noting the states already have such requirements in many instances, and that further duplication of that effort would not enhance the Commission's law enforcement efforts). The Commission believes that the enforcement record for the TSR to date, with over 139 cases brought and $200 million in judgments, shows that the Commission and its state law enforcement partners have made enforcement of the Rule a top priority. Moreover, enforcement actions under the Rule often have been conducted as part of a "sweep" of cases, often accompanied by a media advisory and public education campaign, which serves as a means of raising public awareness of certain kinds of telemarketing fraud. In regard to the suggestion that call centers be randomly monitored for compliance with the Rule, the Commission notes that it has used, and will continue to

H. Section 310.8—Fees.

This section of the Rule, now allocated for the new provision on fees, is reserved. When completed, the fee section will be included here.

I. Section 310.9—Severability.

This provision of the Rule is retained in the amended Rule, but renumbered as § 310.9. Section 310.8, formerly the section number for the Severability provision, now contains the provision regarding fees for the national "do-not-call" registry.

J. Rulemaking Review Requirement.

The original Rule required that a Rule Review proceeding be commenced within five years of the effective date of the original Rule. The amended Rule does not contain an equivalent provision. The Commission has a policy of reviewing all of its Rules and guides on a periodic basis to ensure that they continue to meet their goals and provide the protections that were intended when they were promulgated. This periodic review also provides an opportunity to examine the economic costs and benefits of the particular Rule or guide under review. The Commission believes that this periodic review should be sufficient for the amended Rule, and that it is unnecessary to include a specific provision regarding review within the text of the amended Rule.

K. Effective Date.

The amended Rule is effective on March 31, 2003, and full compliance with all provisions of the amended Rule—except § 310.4(a)(7), the caller identification transmission provision, and § 310.4(b)(1)(iii)(B), the national "do-not-call" registry provision—is required by that date. The Commission

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use, a variety of law enforcement techniques to ensure compliance with the Rule.

believes that making the amended Rule effective on March 31, 2003 will provide more than sufficient time for sellers and telemarketers to change their practices to conform to the amended Rule. The publication of the proposed Rule in January 2002 provided industry members with ample notice of the proposed changes in the Rule, and making the amended Rule effective on March 31, 2003 will give industry members sufficient additional time to familiarize themselves with the requirements of the amended Rule, and to ensure that their operations are in full compliance with all except two provisions of the amended Rule.

The Commission has determined that additional time may be required to allow sellers and telemarketers to come into full compliance with the caller identification transmission requirement. Therefore, full compliance with § 310.4(a)(7) is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

IV. Paperwork Reduction Act

In light of both changes to the Rule following the NPRM and public comments received on Commission staff's prior PRA burden analysis for the NPRM, staff will submit for OMB review and clearance a supporting statement detailing its revised burden analysis.

V. Regulatory Flexibility Act

A. Need for and Objectives of the Rule.

The amendments to the TSR announced here are the result of a review of the existing Rule as required by the

Telemarketing Act.[1027] As discussed above in this SBP, and in the NPRM, the objective of the amendments is to fulfill the mandate of the Telemarketing Act to ensure that consumers are protected from "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." [1028] Other amendments, relating to the solicitation of charitable contributions through telemarketing, are made pursuant to the USA PATRIOT Act.[1029]

B. Summary of the Significant Issues.

The public comments on the proposed Rule are discussed above throughout the SBP, as are the changes that have been made in response to comments indicating that the costs of some of the proposed amendments would be excessive. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive. In response to these comments, the Commission has made a number of modifications in the amended Rule. These changes should significantly reduce the burden on all businesses, including small businesses.

Calls permitted where there is an existing business relationship.

One proposal that commenters contended would impose particularly great costs on small businesses was the proposed national "do-not-call" registry. Commenters were particularly concerned with the requirement that businesses could only call consumers who had put their telephone numbers on the "do-not-call" registry if they had obtained the consumer's express verifiable authorization to make calls to that

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[1027] 15 U.S.C. 6108.

[1028] 15 U.S.C. 6102.

[1029] Pub. L. 107-56 (Oct. 26, 2001).

consumer. For example, Community Bankers expressed the concern that its members would be unable to use outside telemarketers to contact their existing customers. This would, they suggested, force community banks to do their own telemarketing, at higher cost, because calls made by third party telemarketing bureaus would be covered by FTC regulations.[1030] Another commenter noted that small firms may not have the recording equipment that would be needed to establish that they had obtained the consumer's express verifiable authorization to accept calls from that seller.[1031]

Furthermore, many small businesses may not keep their customer records in a form that would permit them to economically compare the telephone numbers of their customers with those on the national "do-not-call" registry and avoid calling those numbers that appear on the registry.[1032] According to NRF, converting their customer lists to a form that can be feasibly compared to the numbers on the national "do-not-call" registry could cost small businesses up to $1.00 per name. Furthermore, even after the records are converted, the NRF reports that the cost of eliminating names that appear on the "do-not-call" registry would be higher for small firms than for larger ones. Whereas, it might cost $0.01 per name to purge a large list, the cost for a small list is put at $0.10 to $0.15 per name.[1033]

[1030] Community Bankers-User Fee at 3.

[1031] AmEx-NPRM at 2. One small company reported that in order to comply with Oregon's "do-not-call" requirements, they had been forced to spend $12,500 to get a computer program written and have hired two additional employees at a cost of approximately $800 per week. (Celebrity Prime Foods-User Fee at 1).

[1032] *See, e.g.*, Ameriquest-NPRM at 9.

[1033] NRF-NPRM at 4-5. ERA placed the cost of comparing a company's calling lists against the "do-not-call" registry at $3 to $5 per 1,000 names, while CCC suggested that the cost would be in the neighborhood of $50 per hour and that it would take two hours for the

As discussed above in the SBP, the Commission has decided to alter the "do-not-call" provision proposed in the NPRM. One of the changes is to create an exemption that will allow a seller and its telemarketer to call consumers with whom the seller has an established business relationship, even if the consumer has placed his or her telephone number on the "do-not-call" registry.[1034] The effect of this change will be that businesses—and in particular small businesses—will not need to check their lists of existing customers against the national "do-not-call" registry. There will also be no need to obtain express verifiable permission before calling someone with whom the business has an established business relationship. Thus, most, if not all, of the costs described above will not be faced by small businesses.[1035]

Quarterly access to "do-not-call" registry.

In addition, as discussed above, the Commission has decided not to require sellers and telemarketers to scrub their calling lists against the national "do-not-call" registry on a monthly basis. Instead, such updating will only be required on a quarterly basis.[1036] Commenters argued that this change was necessary to reasonably limit the costs imposed by the

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average firm to compare their calling lists to the national "do-not-call" registry and delete from the company's lists any numbers that appear on the "do-not-call" registry. ERA-NPRM at 36; Miller Study at 11-12.

[1034] *See* discussion of § 310.4(b)(1)(iii) above.

[1035] While small businesses that wish to telemarket their products to consumers who are not existing customers will still have to check their calling lists against the "do-not-call" registry, they will not necessarily have to perform this work themselves. It is the Commission's understanding that small businesses often find it more economical to employ telemarketing bureaus who make such calls on the behalf of these businesses. A seller that employs a telemarketing bureau can arrange to have the telemarketer compare the names and/or telephone numbers on its lists against the "do-not-call" registry.

[1036] Amended Rule § 310.4(b)(3).

"do-not-call" registry.[1037] It should significantly reduce the expense associated with complying with the "do-not-call" requirements since firms will not need to scrub their lists twelve times per year at an expense that has been estimated at around $100 per seller or telemarketer each time its lists must be scrubbed.[1038]

Harmonization with state "do-not-call" regulations.

Many industry representatives argued that in order to avoid imposing an undue burden on business, particularly small businesses, it was essential that the proposed national "do-not-call" registry not simply be added on to the existing set of state "do-not-call" lists. Rather, in the view of industry, the national registry should incorporate existing and any future state lists and all of the lists should operate under a single, unified set of regulations.[1039] While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time. Instead, as discussed above in the SBP, the Commission is engaged in a process of active consultation with the states that have enacted "do-not-call" statutes and with the FCC in order to develop procedures that will result in one harmonized "do-not-call" registry.[1040] Once fully effectuated, this harmonization should substantially reduce the burden of having to scrub against a large number of separate lists.

[1037] Household Bank-User Fee at 2.

[1038] Miller Study at 11-12.

[1039] *See, e.g.*, Household Bank-User Fee at 2-3; ARDA-User Fee at 1; Ameriquest-User Fee at 9-10; ICIA-User Fee at 1; NEMA-User Fee at 4.

[1040] This approach is consistent with the recommendation of the Small Business Administration ("SBA"), Office of Advocacy. See SBA-User Fee at 5-6.

For-profit fundraisers exempted from national "do-not-call" registry compliance.

The burden placed on small charities by the "do-not-call" requirements has also been significantly reduced. As discussed above, the Commission has determined that for-profit firms that make fundraising calls on behalf of charitable organizations will not be required to ensure that they are not making calls to consumers who have placed their telephone numbers on the national "do-not-call" registry.[1041] Rather, they will only have to honor individual consumer requests not to be called by the particular charity.[1042]

This change is likely to be of significant benefit to smaller charitable organizations since these organizations often find it more efficient to employ for-profit firms to make their calls rather than developing and maintaining the capacity to make such calls using their own staff.[1043] For example, APTS reported that 75 percent of their members chose to hire other firms to manage their telemarketing operations. They further reported that the average annual cost of outsourcing these operations was $182,000, whereas the estimated cost of the stations doing the same amount of telemarketing with its own personnel was $224,000, an increase of almost 25 percent.[1044] Similarly, Red Cross commented that it is more economical to hire a third party to operate short term blood-donor

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[1041] Amended Rule § 310.6(a).

[1042] Amended Rule § 310.4(b)(1)(iii).

[1043] Hudson Bay-Goodman-NPRM at 2. Hudson Bay noted that "[i]nstead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee."

[1044] APTS-NPRM at 3-4.

recruitment programs than to hire and maintain a full-time staff to perform such functions. According to Red Cross "[s]uch trained third party professionals offer expertise and operational efficiencies that cannot be rapidly duplicated by Red Cross to respond to the volatile demand for blood." [1045]

Written confirmation as express verifiable authorization.

Another change that should reduce the burden on small firms involves the procedures a firm may use to obtain the consumer's express verifiable authorization to use an account other than the consumer's credit card or debit card to pay for a purchase. In the NPRM, the Commission proposed to eliminate a procedure by which a firm was permitted to obtain authorization by sending the consumer written confirmation prior to the time the account was charged. In part this proposal was based on the impression that very few firms used this method of obtaining express verifiable authorization.[1046] However, commenters indicated that this was not the case and that many smaller firms—particularly newspapers—used this method.[1047] In response, the Commission has decided to retain the written confirmation method of obtaining express verifiable authorization, with certain modifications, including an exception that makes it unavailable in cases where the transaction involves a "free-to-pay conversion" feature and preacquired account information.[1048]

No ban on preacquired account information.

Another proposal in the NPRM that attracted considerable business opposition was the prohibition on the disclosure or

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[1045] Red Cross-NPRM at 3-4.

[1046] 67 FR at 4508.

[1047] *See, e.g.*, June 2002 Tr. III at 32-33 (NAA).

[1048] *See* amended Rule § 310.3(a)(3)(iii), and discussion of that provision above.

receipt of any consumer's billing information. Commenters argued that such a prohibition on the use of preacquired account information would increase the costs of telemarketing. While these costs were not argued to be specific to small businesses, the costs faced by small businesses would be increased along with those of larger ones. According to CCC, requiring the consumer to provide an account number would add between 60 and 90 seconds to the length of a telemarketing call in those instances where the telemarketer already has the consumer's account information.[1049] MPA estimated the cost of requiring consumers to repeat their account information in the case of an upsell to be between 35 and 60 seconds.[1050] In addition, MPA suggested that requiring consumers to read their account numbers in all instances would lead some consumers to decide not to purchase the item being offered. The effect could be, they suggested, a reduction of five to 30 percent in consumer purchases in response to particular offers.[1051] Finally, a ban on the use of preacquired account information could increase the costs of engaging in telemarketing because of errors in the account information obtained from the consumer—either because the consumer misreads the account number or because the telemarketer makes a mistake in taking down the number.[1052]

[1049] Miller Study at 17. According to the Miller Study, the total cost of this prohibition would have been approximately $1.5 billion. However, this estimate appears to be based on the incorrect assumption that the prohibition on the use of preacquired account information would add 60 to 90 seconds to every sale made in an outbound telemarketing call. In fact, the only sales that would be affected are those where the seller would otherwise obtain payment using preacquired account information.

[1050] MPA-NPRM at 24.

[1051] *Id.* at 19.

[1052] ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7.

As discussed in the SBP above, the Commission has decided not to prohibit the acquisition and use of preacquired account information. Instead, the Commission is limiting the prohibition to unencrypted account information and is requiring that telemarketers and sellers obtain the consumer's express informed consent before any purchase is charged to a consumer's account using preacquired account information. Except for transactions that involve a "free-to-pay conversion" feature combined with preacquired account information, the only steps a seller or telemarketer is required to undertake to obtain this consent are to provide the consumer with sufficient information for the consumer to understand the account that will be charged and to obtain the consumer's express agreement to have the purchase charged to that account. Since both of these are practices that an honest business would follow even in the absence of a rule provision, it is clear that the costs businesses argued would follow from the original proposal have been eliminated.

Relaxed regulation of abandoned calls.

Another proposal contained in the NPRM that businesses argued would significantly increase the costs of telemarketing was the proposal to prohibit telemarketers from "abandoning" telemarketing calls—that is, to prohibit making a call unless a telemarketing sales representative is available to talk to the consumer if the consumer answers. Critics of this proposal argued that it would effectively ban the use of predictive dialers.[1053] This would, they argued, significantly reduce the amount of time the individual telemarketing sales person spends talking to consumers. According to CCC, a telemarketing sales person can handle 13 to 14 calls per hour using a predictive dialer set to abandon five percent of calls. Without a predictive dialer, the same agent can only handle around

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[1053] June 2002 Tr. I at 211 (CCC); DMA-NPRM at 30; PCIC-NPRM at 2.

eight calls per hour—a reduction of about 40 percent.[1054] Another source suggested that a telemarketer using a predictive dialer could make 20 calls per hour, whereas only five calls per hour would be possible without the dialer.[1055]

As discussed in the SBP, the Commission has determined to create a safe harbor to the prohibition on abandoned calls. This safe harbor will allow firms to avoid being cited for violation of this provision of the Rule provided they play a recording that identifies the seller and provides the seller's phone number when a sales representative is not available to handle a call and provided that this occurs in three percent or less of calls that are answered by a consumer. This change should substantially reduce the burden that would have been imposed by a total prohibition on abandoned calls.[1056]

Regulation of upselling.

Finally, the Commission has eliminated an unintended burden that would have resulted from treating any upsell as a separate outbound telemarketing call. As several people have noted, this would have required telemarketers who receive

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[1054] Miller Study at 15.

[1055] Marketlink-NPRM at 3. This estimate, and perhaps the estimate of CCC, may overestimate the [efficiency losses from prohibiting abandoned calls in that the five calls per hour figure is based on the assumption that calls are dialed "manually." This suggests that the estimate may be based on an operation in which the individual sales representative actually dials the number to be called. A requirement not to abandon calls would not require that sales representatives dial their own calls. It would still be possible, if it were cost efficient, to use computer systems to dial the calls, and this could generate some efficiencies relative to manual dialing. What would not be permitted is to dial a call prior to the time a sales representative becomes available or to dial more than one call at a time for each available sales representative.

[1056] As CCC testified at the workshop, "[W]hat we found out is that . . . below 5 percent or 4 percent or 3 percent [rate of abandonment], you're really beginning to raise costs . . . ." June 2002 Tr. I at 212 (CCC).

inbound calls to comply with the "do-not-call" provisions of the Rule as well as the calling hours provision before offering any upsell product.[1057] Such a requirement would have imposed substantial burdens on sellers who receive inbound telemarketing calls. However, it was never the intention of the Commission to require compliance with either the "do-not-call" provisions or the calling hour provisions in this context,[1058] and this requirement has been eliminated in the amended Rule which provides a separate definition of an upsell and clarifies that these provisions do not apply to an upsell.

C. Description of Small Entities to Which the Rule Will Apply.

This Rule will primarily impact firms that make telephone calls to consumers in an attempt to sell their products or services or entities that make calls to solicit charitable contributions. That is, the Rule will primarily impact entities that make outbound calls to consumers. Also affected will be firms that provide such services for others on a contract basis. It has been estimated that outbound calls to consumers resulted in total sales of $274.2 billion in 2001, and that the telemarketing industry that markets to consumers employs 4.1 million workers.[1059]

The number of firms making such outbound telemarketing calls, and the number that qualify as small entities, cannot be reliably estimated. According to the Office of Advocacy of the SBA, United States Census data shows that there are 2,305 firms that are identified as telemarketing bureaus. Of these, 1,279 are classified as being small businesses because

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[1057] *See, e.g.*, June 2002 Tr. I at 210 (CCC); June 2002 Tr. II at 214-15 (DMA).

[1058] June 2002 Tr. I at 210-11 (FTC); June 2002 Tr. II at 215 (FTC).

[1059] DMA-NPRM at 5. ATA estimates employment in business-to-consumer telemarketing at 5.4 million. ATA-NPRM at 3.

they have sales of less than $5 million per year.[1060] These are firms that provide telemarketing services for other firms. However, not all of these firms will be impacted by the Rule to the same extent. According to NAICS, firms that are classified as telemarketing bureaus include firms that provide "telemarketing services on a contract or fee basis for others, such as (1) promoting clients' products or services by telephone, (2) taking orders for clients by telephone, and (3) soliciting contributions or providing information for clients by telephone."[1061] Firms that take orders for clients by telephone, as well as some firms that provide information for their clients by telephone, are going to be responding to calls made by consumers and not making calls themselves. Unless such firms are engaging in upselling of products or services that involve a "free-to-pay conversion" feature, they will not be impacted by the proposed Rule to any significant extent.

In addition to firms that provide telemarketing services for others, the Rule will have an effect on firms that use telemarketing as a way to market their own products. These may include, among others, retailers, manufacturers, and financial service providers.[1062] The number of such firms—and the number of those that are classified as small businesses—cannot be determined because such firms generally think of themselves as producers or sellers of particular products and not as telemarketers. Similarly, in the

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[1060] SBA-User Fee at 3. The size of telemarketing bureaus that qualify as being small businesses was increased to $6 million as of October 2, 2002. *See* SBA, Small Business Size Standards Matched to North American Industry Classification System (NAICS), http://www.sba.gov/size/sizetable2002.html.

[1061] U.S. Census Bureau, 1997 NAICS Definitions, 561 Administrative and Support Services, http://www.census.gov/pub/epcd/naics/NDEF561.HTM.

[1062] ATA-User Fee at 2.

available statistics, these firms will be classified as producers or sellers of particular products and not as telemarketers.[1063]

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule.

As discussed above in the SBP, the amended Rule alters some collection of information requirements. The effect of those requirements on all businesses is discussed in detail in the PRA section of this Notice. First, the amended Rule requires firms that use preacquired account information in conjunction with a "free-to-pay conversion" feature to tape record all such transactions to show that they have obtained the consumer's express informed consent to charge the consumer's account.[1064] Section 310.5(a)(5) requires that the seller or telemarketer maintain copies of such audio recordings for 24 months. Similarly, § 310.5(a)(5) requires that firms retain for 24 months copies of any written express agreements received from consumers permitting the company to call the consumer even though the consumer's phone number is included on the "do-not-call" registry.[1065] Finally, the amended Rule extends the recordkeeping requirements of § 310.5 to include charitable solicitations in a non-sales context, as required by the USA PATRIOT Act. All other amendments to the Rule relate to the Rule's disclosures or other compliance requirements and are necessary to prevent telemarketing fraud and abuse.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices

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[1063] Some commenters suggested that small firms are more likely to rely on telemarketing to sell their products because they cannot afford other, more expensive forms of advertising. *See, e.g.*, Ameriquest-User Fee at 6; ATA-NPRM at 4.

[1064] *See* § 310.4(a)(6)(i)(C).

[1065] The provision allowing for such consent is at § 310.4(b)(1)(iii)(B)(*i*).

covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps Taken to Minimize Impact on Small Entities.

As discussed above, the Telemarketing Act directs the Commission to enact "rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." [1066] Each of the amendments in the amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices. In order to achieve this end, the Commission believes that it is necessary to enact regulations that cover small and large firms equally. Based on the Commission's enforcement experience, it is clear that many of the firms that engage in fraudulent telemarketing activities are small firms. A failure to include such small firms within the requirements of the regulations would, therefore, fail to prohibit deceptive practices by the types of firms that account for a significant share of the problems the Commission encounters.

At the same time, as discussed above both in the SBP and in the "Summary of Significant Issues Raised by the Public Comments in Response to the IRFA," the Commission has sought to minimize as much as possible the burdens imposed on all affected entities, including small businesses. In general, the changes made in response to public comments have further reduced the burdens. The amendments to the disclosure and recordkeeping provisions of the TSR are generally consistent with the business practices that most sellers and telemarketers, regardless of size, would choose to follow, even absent legal requirements.

[1066] 15 U.S.C. 6102(a)(1).

The Commission has taken care in developing the amendments to the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. It also allows a seller and a telemarketer making calls on the seller's behalf to allocate between themselves the responsibility for maintaining required records.

VI. National Environmental Policy Act

Under the Commission's Rules of Practice implementing the National Environmental Policy Act of 1969 ("NEPA"),[1067] no "major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement ('EIS') has been prepared," if such is required.[1068] To determine if such an impact statement is required, the Commission generally prepares an "environmental assessment." However, such an environmental assessment is not necessary in every circumstance. For example, in circumstances when the "environmental effects, if any, would appear to be . . . so uncertain that environmental analysis would be based on speculation," no "environmental assessment" is required.[1069] The Commission believes, for the reasons set forth below, that this exception is applicable in the instant case, and that because the environmental effects, if any, of the amended TSR are uncertain and based on speculation, the Commission is not required to prepare an environmental assessment.

[1067] 42 U.S.C. 4321 *et seq.*

[1068] 16 CFR 1.81, 1.82.

[1069] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

The amended TSR would modify the original Rule in several ways. Each of these is outlined above in Section I (F), which summarizes the changes in the amended Rule. However, the only comment that raised the issue of the environmental effects of the Rule did so solely with regard to the national "do-not-call" registry provision. Because the Commission does not believe that any other modification in the amended Rule implicates any impact on the environment, the analysis is confined to this provision.

The "do-not-call" registry provision will establish a centralized means for consumers across the country to notify sellers and telemarketers of their preference not to receive unsolicited outbound telemarketing calls.[1070] As discussed in greater detail above, in the section discussing § 310.4(b)(1)(iii), the "do-not-call" registry provision supplements the original Rule's provision that allows consumers to exercise their "do-not-call" rights on a company-by-company basis. The Commission determined, based on the extensive record evidence from the rulemaking proceeding, that a national "do-not-call" registry is necessary to effectuate the purposes of the Telemarketing Act.[1071]

The comment that addressed the potential environmental impact of the proposed national "do-not-call" registry stated, in relevant part,

> For obvious reasons the FTC's proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for the reasons stated above [wherein the commenter argues that the national "do-not-call" registry will negatively impact inbound

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[1070] *See* discussion of § 310.4(b)(1)(iii) above.

[1071] 15 U.S.C. 6102(a)(3)(A) (mandating that the Commission include in its Rule "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy").

call centers who rely upon a combination of inbound and outbound calling to survive],[1072] consumers' ability to themselves purchase via catalogs may be compromised as well, as "call centers" are forced to close in the face of insufficient "outbound telemarketing work." Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution.[1073]

DeHart concluded, based on its belief that the "do-not-call" registry provision would increase the number of consumers driving to shopping at malls as a result of the implementation of the national "do-not-call" registry provision, that the Commission must prepare an EIS or, at minimum, an environmental assessment.[1074]

The underlying premise in the DeHart comment, that a national "do-not-call" registry will have a negative impact on call centers that rely in part on inbound telemarketing and in part on outbound telemarketing for their livelihood, is unsupported in the comment. No evidence, other than a mere allusion to a study that purportedly shows that some firms' cost of providing inbound call center service would increase if their outbound telemarketing load decreased, is provided by

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[1072] DeHart-NPRM at 2-3 (although the commenter alludes to a study that corroborates its assertion on this point, no title or citation is provided for such study).

[1073] DeHart-NPRM at 3.

[1074] *Id.* The Commission believes that this allegation would constitute, at most, "indirect effects" under the NEPA implementing regulations, or those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR 1508.8(b). The Commission does not believe that the "do-not-call" registry provision has been or could reasonably be alleged to have "direct effects" or those "caused by the action and occur at the same time and place." 40 CFR 1508.8(a).

DeHart, nor is support for this proposition found in the record as a whole. Therefore, the fundamental assumption on which DeHart's argument is based is one that appears to be mere speculation.

The Commission believes that speculation, and indeed, logic, could as easily lead to the conclusion that a diminution in outbound calling, resulting from consumers' decision to place their telephone numbers on the national "do-not-call" registry, could lead sellers to use other channels of distance marketing to sell their products, including channels that would significantly increase inbound telemarketing, such as direct mail, catalog sales, and Internet sales. This would mean that, even if many consumers utilize the "do-not-call" registry, inbound calling may benefit, not suffer, from such a result. Moreover, DeHart cites no authority for the proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national "do-not-call" registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the "do-not-call" registry provision. It seems likely, based on the experience of states that have implemented statewide "do-not-call" lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national "do-not-call" registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice

of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the "do-not-call" registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national "do-not-call" registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national "do-not-call" registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.[1075]

[1075] 16 CFR 1.83. *See also National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

List of Subjects in 16 CFR Part 310.

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

310.1 Scope of regulations in this part.

310.2 Definitions.

310.3 Deceptive telemarketing acts or practices.

310.4 Abusive telemarketing acts or practices.

310.5 Recordkeeping requirements.

310.6 Exemptions.

310.7 Actions by states and private persons.

310.8 Reserved: Fee for access to "do-not-call" registry.

310.9 Severability.

Authority: 15 U.S.C. 6101-6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or

to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller

different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement

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[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for

goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

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[3] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and pre-acquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or

for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[6] of that person; or

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[6] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the

Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4 (b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7] ; and

(iv) the seller or telemarketer, in accordance with § 310.5 (b)-(d), retains records establishing compliance with § 310.4 (b)(4)(i)-(iii).

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[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(c) *Calling time restrictions*. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully,

promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4 (a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4 (a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3 (a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4 (a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4 (b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not

feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.§ 310.8 [Reserved: Fee for access to "do-not-call" registry.]

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

Appendix A

List of Acronyms for Rule Review Commenters

February 28, 2000 Request for Comment

Acronym—Commenter

AARP—AARP

Alan—Alan, Alicia

ARDA—American Resort Development Association

ATA—American Teleservices Association

Anderson—Anderson, Wayne

Baressi—Baressi, Sandy

Bell Atlantic—Bell Atlantic

Bennett—Bennett, Douglas H.

Biagiotti—Biagiotti, Mary

Bishop—Bishop, Lew & Lois

Blake—Blake, Ted

Bowman-Kruhm—Bowman-Kruhm, Mary

Braddick—Braddick, Jane Ann

Brass—Brass, Eric

Brosnahan—Brosnahan, Kevin

Budro—Budro, Edgar

Card—Card, Giles S.

Collison—Collison, Doug

Conn—Conn, David

Conway—Conway, Candace

Croushore—Croushore, Amanda

Curtis—Curtis, Joel

Dawson—Dawson, Darcy

DMA—Direct Marketing Association

DSA—Direct Selling Association

Doe—Doe, Jane

ERA—Electronic Retailing Association

FAMSA—FAMSA-Funeral Consumers Alliance, Inc.

Gannett—Gannett Co., Inc.

Garbin—Garbin, David and Linda

A. Gardner—Gardner, Anne

S. Gardner—Gardner, Stephen

Gibb—Gibb, Ronald E.

Gilchrist—Gilchrist, Dr. K. James

Gindin—Gindin, Jim

Haines—Haines, Charlotte

Harper—Harper, Greg

Heagy—Heagy, Annette M.

Hecht—Hecht, Jeff

Hickman—Bill and Donna

Hollingsworth—Hollingsworth, Bob and Pat

Holloway—Holloway, Lynn S.

Holmay—Holmay, Kathleen

ICFA—International Cemetery and Funeral Association

Johnson—Johnson, Sharon Coleman

Jordan—Jordan, April

Kelly—Kelly, Lawrence M.

KTW—KTW Consulting Techniques, Inc.

Lamet—Lamet, Jerome S.

Lee—Lee, Rockie

LSAP—Legal Services Advocacy Project

LeQuang—LeQuang, Albert

Lesher—Lesher, David

Mack—Mack, Mr. and Mrs. Alfred

MPA—Magazine Publishers of America, Inc.

Manz—Manz, Matthias

McCurdy—McCurdy, Bridget E.

Menefee—Menefee, Marcie

Merritt—Merritt, Everett W.

Mey—Mey, Diana

Mitchelp—Mitchelp

TeleSource—Morgan-Francis/Tele-Source Industries

NACHA—NACHA-The Electronic Payments Association

NAAG—National Association of Attorneys General

NACAA—National Association of Consumer Agency Administrators

NCL—National Consumers League

NFN—National Federation of Nonprofits

NAA—Newspaper Association of America

NASAA—North American Securities Administrators Association

Nova53—Nova53

Nurik—Nurik, Margy and Irv

PLP—Personal Legal Plans, Inc.

Peters—Peters, John and Frederickson, Constance

Reese—Reese Brothers, Inc.

Reynolds—Reynolds, Charles

Rothman—Rothman, Iris

Runnels—Runnels, Mike

Sanford—Sanford, Kanija

Schiber—Schiber, Bill

Schmied—Schmied, R. L.

Strang—Strang, Wayne G.

TeleSource—Morgan-Francis/Tele-Source Industries

Texas—Texas Attorney General

Thai—Thai, Linh Vien

Vanderburg—Vanderburg, Mary Lou

Ver Steegt—Ver Steegt, Karen

Verizon—Verizon Wireless

Warren—Warren, Joshua

Weltha—Weltha, Nick

Worsham—Worsham, Michael C., Esq.

Appendix B

List of Acronyms for NPRM Commenters

Acronym—Commenter

1-800-DoNotCall—1-800-DoNotCall, Inc.

AARP—AARP

ACA—ACA International

ACUTA—ACUTA

Advanta—Advanta Corp.

Aegis—Aegis Communications Group

Alabama Police—Alabama State Police Association, Inc.

AAST—American Association of State Troopers

ABA—American Bankers Association

ABIA—American Bankers Insurance Association

American Blind—American Blind Products, Inc.

ACE—American Council on Education

ADA—American Diabetes Association

Am Ex—American Express

AFSA—American Financial Services Association

Red Cross—American Red Cross

ARDA—American Resort Development Association

ARDA-2—American Resort Development Association-Do Not Call Registry

American Rivers—American Rivers

ASTA—American Society of Travel Agents

ATA—American Teleservices Association

Blood Centers—America's Blood Centers

Community Bankers—America's Community Bankers

Ameriquest—Ameriquest Mortgage Company

Armey—Armey, The Honorable Dick (U.S. House of Representatives)

AFP—Association of Fundraising Professionals

APTS—Association of Public Television Stations

ANA—Association of National Advertisers

Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association

Assurant—Assurant Group

Avinta—Avinta Communications, Inc.

Ayres—Ayres, Ian

Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)

BofA—Bank of America

Bank One—Bank One Corporation

Beautyrock—Beautyrock, Inc.

BellSouth—BellSouth Corporation

Best Buy—Best Buy Company, Inc.

BRI—Business Response Inc.

CCAA—California Consumer Affairs Association

CATS—Californians Against Telephone Solicitation

Capital One—Capital One Financial Corporation

Car Wash Guys—WashGuy Systems

Carper—Carper, The Honorable Thomas R. (U.S. Senate)

Celebrity Prime Foods—Celebrity Prime Foods

Cendant—Cendant Corporation

Chamber of Commerce—Chamber of Commerce of the United States of America

CRF—Charitable Resource Foundation, Inc.

Chicago ADM—Chicago Association of Direct Marketing

Childhood Leukemia—Childhood Leukemia Foundation

CDI—Circulation Development, Inc.

CURE—Citizens United for Rehabilitation of Errants

Citigroup—Citigroup Inc.

Civil Service Leader—Civil Service Leader

Collier Shannon-Collier Shannon Scott

Comcast—Comcast

CNHI—Community Newspaper Holdings, Inc.

Community Safety—Community Safety, LLC

Connecticut—Connecticut Commissioner of Consumer Protection

CBA—Consumer Bankers Association

CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation

CMC—Consumer Mortgage Coalition

Consumer Privacy—Consumer Privacy Guide

Convergys—Convergys Corporation

CCA—Corrections Corporation of America

CASE—Council for Advancement and Support of Education

Cox—Cox Enterprises

Craftmatic—Craftmatic Organization, Inc.

Davis—Davis, The Honorable Tom (U.S. House of Representatives)

DBA—Debt Buyers Association

DeHart—DeHart & Darr Associates

Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)

DialAmerica—DialAmerica Marketing, Inc.

DMA—Direct Marketing Association/U.S. Chamber of Commerce

DMA-NonProfit—Direct Marketing Association NonProfit Federation

DSA—Direct Selling Association

Discover—Discover Bank

DC—District of Columbia, Office of the People's Counsel

Eagle—Eagle Bank

EFSC—Electronic Financial Services Council

EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp, International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivisim, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.

ERA—Electronic Retailing Association

EPI—Enterprise Prison Institute

Experian—Experian Marketing Information Solutions, Inc.

Fiber Clean—Fiber Clean

Roundtable—Financial Services Roundtable

Fire Fighters Associations:

Asheville FFA—Asheville (NC) Fire Fighters Association

Bethelehem FFA—Bethlehem (PA), IAFF Local 735

Boone FFA—Boone (IA)

California FFA—California Professional Firefighters

Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11

Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)

Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820

Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700

Greensboro FFA—Greensboro (NC)

Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653

Indiana FFA—Indiana, Professional Fire Fighters Union of

Iowa FFA—Iowa Professional Firefighters

Missouri FFA—Missouri State Council of Fire Fighters

North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of

North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224

Ottumwa FFA—Ottumwa (IA)

Roanoke FFA—Roanoke (VA) Fire Fighters Association

Springfield FFA—Springfield (MO) Firefighters Association, Local 52

Sycamore FFA—Sycamore, IAFF Local 3046

Utah FFA—Utah, Professional Firefighters of

Vermont FFA—Vermont, Professional Firefighters of

Wisconsin FFA—Wisconsin, Professional Fire Fighters of

FireCo—FireCo, L.L.C.

Fleet—FleetBoston Financial Corporation

FOP—Fraternal Order of Police, Grand Lodge

FPIR—Fund for Public Interest Research, Inc.

FCA—Funeral Consumers Alliance, Inc.

Gannett—Gannett Co., Inc.

Gottschalks—Gottschalks, Inc.

Greater Niagara—Greater Niagara Newspapers

Green Mountain—Green Mountain Energy Company

Gryphon—Gryphon Networks

Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)

Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)

Herald Bulletin—Herald Bulletin

Horick—Horick, Bob

Household International:

Household Auto—Joint comment: Household Finance Corp, OFL-A Receivables Corp., and Household Automotive

Household Credit—Household Bank, Credit Card Services

Household Finance—Household Finance Corporation

Household-Montalvo—Montalvo, David

HSBC—HSBC Bank USA

Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner

Hudson Bay-Goodman—Hudson Bay Company-Goodman

HRC—Human Rights Campaign

IBM—IBM

ICT—ICT Group, Inc.

Illinois Police—Illinois Council of Police & Sheriffs

Infocision—Infocision Management Corporation

Inhofe—Inhofe, The Honorable James (U.S. Senate)

Insight—Insight Realty, Inc.

ITC—Interactive Teleservices Corp.

ICFA—International Cemetery & Funeral Association

IFA—International Franchise Association

IUPA—International Union of Police Associations

ICC—Internet Commerce Coalition

Intuit—Intuit Inc.

Italian American Police—Italian American Police Society of New Jersey

Johnson—Johnson, The Honorable Tim (U.S. Senate)

Kansas—Kansas, House of Representatives

KeyCorp—KeyCorp.

Lautman—Lautman & Associates

LSAP—Legal Services Advocacy Project

Leggett & Platt—Leggett & Platt

Lenox—Lenox Inc.

Leukemia Society—Leukemia & Lymphoma Society

Life Share—Life Share

Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)

MPA—Magazine Publishers Association

Make-A-Wish—Make-A-Wish Foundation of America

Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)

March of Dimes—March of Dimes Birth Defects Foundation

Marketlink—Marketlink, Inc.

MBA—Massachusetts Bankers Association

MasterCard—MasterCard International

MBNA—MBNA America Bank, N.A.

McClure—McClure, Scott

McConnell—McConnell, The Honorable Mitch (U.S. Senate)

Metris—Metris Companies, Inc.

Michigan Nonprofit—Michigan Nonprofit Association

MidFirst—MidFirst Bank

MBAA—Mortgage Bankers Association of America

Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)

NACHA—NACHA-The Electronic Payments Association

Nadel—Nadel, Mark S. (law review article: "Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy," 4 Yale Journal on Regulation 99 (Fall 1986)

NAAG—National Association of Attorneys General

NACAA—National Association of Consumer Agency Administrators

NAIFA—National Association of Insurance & Financial Advisors

NAR—National Association of Realtors

NARUC—National Association of Regulatory Utility Commissioners

ARVC—National Association of RV Parks & Campgrounds

NASCO—National Association of State Charity Officials

NASUCA—National Association of State Utility Consumer Advocates

E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy

NCTA—National Cable & Telecommunications Association

National Children's Cancer—National Children's Cancer Society, Inc.

NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group

NCLF—National Children's Leukemia Foundation

NCL—National Consumers League

NEMA—National Energy Marketers Association

NFPPA—National Family Privacy Protection Association

NFIB—National Federation of Independent Business

NFC—National Franchise Council

NFDA—National Funeral Directors Association

NNA—National Newspaper Association of America

NPMA—National Pest Management Association

NPR—National Public Radio

NRF—National Retail Federation

NTC—National Troopers Coalition

Nelson—Nelson, The Honorable E. Benjamin (U.S. Senate)

NetCoalition—NetCoalition

Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)

NeuStar—NeuStar, Inc.

New Orleans—New Orleans, City Council of (CNO)-Utility, Cable & Telecommunications Committee

NJ Police—New Jersey Police Officers Foundation, Inc.

NYSCPB—New York State Consumer Protection Board

NAA—Newspaper Association of America

Nextel—Nextel Communications, Inc.

Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones,

Ronnie Shows, and Eric Cantor (U.S. House of Representatives)

Noble—Noble Systems

NATN—North American Telephone Network LLC

NC Zoo—North Carolina Zoological Society

Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition

NSDI—NSDI Teleperformance

OSU—Ohio State University

OTC—Ohio Troopers Coalition

Pacesetter—Pacesetter Corporation

PVA—Paralyzed Veterans of America

Paramount—Paramount Lists, Inc.

Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)

Patrick—Patrick, George W.

Paul—Paul, The Honorable Ron (U.S. House of Representatives)

Pelland—Pelland, Paul

PLP—Personal Legal Plans, Inc.

Michigan Police—Police Officers Association of Michigan

possibleNOW—possibleNOW.com, Inc.

PRC—Privacy Rights Clearinghouse

Private Citizen—Private Citizen, Inc.

Proctor—Proctor, Alan

PBP—Progressive Business Publications

PCIC—Progressive Casualty Insurance Company

Angel Food—Project Angel Food

PMA—Promotion Marketing Association

Purple Heart—Purple Heart Service Foundation, Military Order of

Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)

Redish—Redish, Martin H., Esq.

Reed Elsevier—Reed Elsevier Inc.

Reese—Reese Brothers, Inc.

SBC—SBC Communications Inc.

Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)

Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)

SHARE—SHARE

SIIA—Software & Information Industry Association

Southerland—Southerland, Inc.

Southern Poverty—Southern Poverty Law Center

Special Olympics—Special Olympics, Inc.

SO-AZ—Special Olympics Arizona

SO-CA—Special Olympics Southern California

SO-CO—Special Olympics Colorado

SO-CN—Special Olympics Connecticut

SO-IA—Special Olympics Iowa

SO-KY—Special Olympics Kentucky

SO-MD—Special Olympics Maryland

SO-MO—Special Olympics Missouri

SO-MT—Special Olympics Montana

SO-NH—Special Olympics New Hampshire

SO-NJ—Special Olympics New Jersey

SO-NM—Special Olympics New Mexico

SO-NY—Special Olympics New York

SO-VT—Special Olympics Vermont

SO-VA—Special Olympics Virginia

SO-WA—Special Olympics Washington

SO-WI—Special Olympics Wisconsin

SO-WY—Special Olympics Wyoming

Spiegel—Spiegel, Marilyn

Stage Door—Stage Door Music Productions, Inc.

Statewide Appeal—Statewide Appeal Inc.

Success Marketing—Success Marketing, Inc.

Synergy Global—Synergy Global Networks, The

Synergy Solutions—Synergy Solutions, Inc.

Sytel—Sytel Limited

Tate—Tate & Associates

Technion—Technion Communications Corp

TDI—Telecommunications for the Deaf, Inc.

TeleDirect—TeleDirect International, Inc.

Telefund—Telefund, Inc.

Teleperformance—Teleperformance USA

TRC—Tele-Response Center

TeleStar—TeleStar Marketing, L.P.

TRA—Tennessee Regulatory Authority

Terry—Terry, The Honorable Lee (U.S. House of Representatives)

Texas Environment—Texas Campaign for the Environment

Texas PUC—Texas Office of Public Utility Counsel

Thayer—Thayer, Richard E., Esq.

Time—Time, Inc.

Tribune—Tribune Publishing Company

UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ, Federal Bureau of Prisons)

DOJ—U.S. Department of Justice

Uniway—Uniway of Coastal Georgia

Verizon—Verizon Companies

Virginia—Virginia Attorney General

VISA—VISA U.S.A., Inc.

Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)

Weber—Weber, Ron & Associates, Inc.

Wells Fargo—Wells Fargo & Company

White—White, David T.

WTA—Wisconsin Troopers' Association Inc.

Worsham—Worsham, Michael C., Esq.

YPIMA—Yellow Pages Integrated Media Association (YPIMA)

Supplemental Comments

AARP-Supp.—AARP

AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)

Allstate-Supp.—Allstate Life Insurance Company

Community Bankers-Supp.—America's Community Bankers

AICR-Supp.—The American Institute for Cancer Research (Kathryn L. Ward)

Red Cross-Supp.—American Red Cross

ARDA-Supp.—The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)

ATA-Supp.—American Teleservices Association

Associations-Supp.—Associations Letter

Avinta-Supp.—Avinta (Abe Chen)

Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)

Celebrity Prime Foods-Supp.—Celebrity Prime Foods

Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)

Christian Appalachian-Supp.—The Christian Appalachian Project

Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)

Covington & Burling-Supp.—Covington and Burling

DialAmerica-Supp.—DialAmerica Marketing, Inc.

DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter

DMA Study-Supp.—Direct Marketing Association-Study

ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association

EPI-Supp.—Enterprise Prison Institute

Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)

FDS-Supp.—Federation Department Stores

Hoar-Supp.—Hoar, Wesley C.

Illinois-Supp.—Illinois Attorney General's Office

ICTA-Supp.—Industry Council for Tangible Assets

Luntz-Supp.—Luntz Research Companies (Chrys Lemon)

MPA-Supp.—Magazine Publishers of America

Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)

McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)

McKenna-Supp.—McKenna, Douglas M.

Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)

Minnesota-Supp.—Minnesota Attorney General's Office

Missouri-Supp.—Missouri Attorney General's Office

NACDS-Supp.—National Association of Chain Drug Stores

Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)

NAR-Supp.—National Association of Realtors

NWF-Supp.—National Wildlife Federation

NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)

NAA July 31-Supp.—Newspaper Association of America

Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition

PMA-Supp.—Promotion Marketing Association

Putnam-Supp.—Putnam, The Honorable Adam H. (U.S. House of Representatives)

Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)

SBC-Supp.—SBC Communications Inc.

Time-Supp.—Time, Inc.

Vermont-Supp.—Vermont Attorney General's Office

WWF-Supp.—World Wildlife Fund (Deborah Hechinger)

Worsham-Supp.—Worsham, Michael C.

User Fee Comments

AARP-User Fee—AARP

ABA-User Fee—American Bankers Association

Red Cross-User Fee—American Red Cross

ARDA-User Fee—American Resort Development Association

ATA-User Fee—American Teleservices Association

Community Bankers-User Fee—America's Community Bankers

Ameriquest-User Fee—Ameriquest Mortgage Company

Celebrity Prime Foods-User Fee—Celebrity Prime Foods

CBA-User Fee—Consumer Bankers Association

DialAmerica-User Fee—DialAmerica Marketing, Inc.

DMA Letter-User Fee—Direct Marketing Association

DMA Comments-User Fee—Direct Marketing Association

Discover-User Fee—Discover Bank

ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)

Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)

Hudson Bay-User Fee—Hudson Bay Company of Illinois, Inc.

ICTA-User Fee—Industry Council for Tangible Assets

InfoCision-User Fee—InfoCision Management Corporation

ITC-User Fee—Interactive Teleservices Corporation

MPA-User Fee—Magazine Publishers of America

MasterCard-User Fee—MasterCard International, Inc.

NACDS-User Fee—National Association of Chain Drug Stores

NAR-User Fee—National Association of Realtors

NASUCA-User Fee—National Association of State Utility Consumer Advocates

NEMA-User Fee—National Energy Marketers Association

Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition

SBC-User Fee—SBC Communications, Inc.

Tennessee-User Fee—Tennessee Regulatory Authority

SBA-User Fee—United States Small Business Administration, Office of Advocacy

Visa-User Fee—Visa U.S.A., Inc.

Wells Fargo-User Fee—Wells Fargo & Company

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule ("TSR"), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues—how the Commission determines whether an act or practice is "abusive" for purposes of the TSR, and the national do-not-call registry.

Abusive Telemarketing Acts or Practices

The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") directs the Commission to promulgate rules that prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act's examples and their emphasis on privacy protection, the

Commission employs its traditional unfairness analysis.[1] I understand the Commission's intention to narrow the potentially expansive scope of the term "abusive" by using its unfairness analysis. However, given the broad ordinary meaning of the term "abusive," I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term "unfair." Therefore, I would have preferred it had the Commission looked to the plain meaning of the term "abusive" and then formulated a separate standard to identify abusive telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission's conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers' or donors' express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent

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[1] Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatment.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission's authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. *See* Statement of Basis and Purpose at 100, n. 428. However, because the Act does not limit the Commission's authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers' consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers' accounts. The Commission's law enforcement experience corroborates this conclusion. [2]As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

The National Do-Not-Call Registry

The Telemarketing Act and the TSR recognize consumers' "right to be let alone." *See, e.g., Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the "right to be let alone" is the "most comprehensive of rights and the right most valued by civilized men"). In the context of telemarketing, there is an inherent tension between this

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[2] *See* Statement of Basis and Purpose at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers' actual credit card numbers.

right and the First Amendment's right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls—calls to induce the purchase of goods and services from companies within the FTC's jurisdiction (except where the consumer has an "established business relationship" with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the "entity-specific" do-not-call provision, which prohibits them from calling consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities' First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR's requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political

fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (e.g., banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.[3] Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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[3] The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC's jurisdiction. Notice of Proposed Rulemaking, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 FR 62667 (Oct. 8, 2002).